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MARIA LOPEZ, PETITIONER, v. AGI MEDIA, RESPONDENT.

NO. 07WC 21879, 07WC 21880

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2011 Ill. Wrk. Comp. LEXIS 630; 11IWCC0576

June 16, 2011

JUDGES: Kevin W. Lamborn; Daniel R. Donohoo; Thomas J. Tyrrell

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, permanent partial disability and maintenance and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the Decision of the Arbitrator only to vacate the 20% man as a whole award that was meant to compensate Petitioner for the loss of use of profession. The Commission, in vacating this award, finds that Petitioner failed to prove that the injury to her left upper extremity impeded her ability to work in her customary and usual profession. The Commission notes the evidence that indicates that Petitioner engaged in full-duty work for two employers after being terminated by Respondent.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 350.39 per week for a period of 21-1/7 weeks, that being the period of temporary total incapacity for work under § 8(b) of the Act.

IT [*2] IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 350.39 per week for a period of 88.55 weeks, as provided in § 8(e)10 of the Act, for the reason that the injuries sustained caused the 35% loss of use of the left arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner temporary partial disability benefits in the sum of $ 173.12 per week for a period of 21 weeks, in accordance with Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner maintenance benefits in the sum of $ 350.39 per week for 58-1/7 weeks, as provided for in Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 998.76 for medical expenses under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 63,600.00. The [*3] probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

ATTACHMENT:

ARBITRATION DECISION

Maria Lopez
Employer/Petitioner

v.

AGI Media/Mead Westvaco
Employer/Respondent

Case # **07** WC **21879**

Consolidated cases: **07 WC 21880**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin,** Arbitrator of the Commission, in the city of **Chicago,** on **May 13, 2010 and June 11, 2010.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
B. [X] Was there an employee-employer relationship?
C. [X] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
G. [X] What were Petitioner's [*4] earnings?
J. [X] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [X] What temporary benefits are in dispute?
[X] TPD
[X] Maintenance
[X] TTD
L. [X] What is the nature and extent of the injury?
M. [X] Should penalties or fees be imposed upon Respondent?
O. [X] Other **Vocational rehabilitation and placement services**

FINDINGS

On **March 5, 2007,** respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between petitioner and respondent.

On this date, petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, petitioner earned an average weekly wage of $ **525.58.**

On the date of accident, petitioner was **37** years of age, ***married*** with **2** dependent children.

Petitioner ***has*** received all reasonable and [*5] necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent is entitled to a credit for medical bills that they have paid as well as $ **2,283.61** for short-term disability benefits that they have paid.

ORDER

The respondent shall pay the petitioner $ **998.76** for medical services, subject to Sections 8(a) and 8.2 of the Act, as amended.

The respondent shall pay the petitioner temporary total disability benefits of $ **350.39**/week for **21-1/7** weeks, from **2/1/08** through **3/11/08** and from **7/13/08** through **10/28/08,** as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

The respondent shall pay the petitioner temporary partial disability benefits of $ **173.12**/week for **21** weeks, in accordance with Section 8(a) of the Act. Please see page 16 of the rider.

The respondent shall pay the petitioner maintenance benefits of $ **350.39**/week [*6] for **58-1/7** weeks, from **10/29/08** through **11/30/08** and from **05/05/09** through **05/13/10,** as provided in Section 8(a) of the Act.

The respondent shall pay the petitioner the sum of $ **315.35**/week for a further period of **188.55** weeks, as provided in Sections 8(e)10 and 8(d)2 of the Act, because the injuries she sustained caused a loss use of her left arm of **35%** and a loss of use, man as a whole, of **20%.**

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

RIDER TO ARBITRATION DECISION

FINDINGS OF FACT

The petitioner claims accidental injuries arising out of and in the course of her employment [*7] with the respondent that occurred on August 1, 2006 and March 5, 2007. The petitioner was employed with the respondent beginning in August 2002 as a packer. Her job involved packing boxes of various products such as cosmetics and

DVD's. The petitioner's testimony with respect to the number of boxes she would pack in an average work day was confusing and made it difficult to understand the volumes that she handled.

On August 1, 2006, she presented to Westlake Occupational Health Department ("Westlake") with complaints of pain to the left upper arm radiating to the wrist. The history states this would occur after eight hours of work as a packer and that it was persistent for eight months but that she was not sure of the date of onset. The examination of the left shoulder revealed positive mild tenderness of the infraspinatus. Range of motion was intact without pain or difficulty. She had a negative Jobs test. There was no erythema, edema or ecchymosis noted. The diagnosis was a questionable left lateral epicondylitis and a left shoulder strain. She was placed on light duty, instructed to wear an elbow splint and use Motrin as prescribed. (P. Ex. 2)

The petitioner continued under the [*8] care of the doctors at Westlake and had physical therapy through September 12, 2006. An MRI of the shoulder, taken September 21, 2006, revealed tendinosis of the supraspinatus tendon and minimal fluid in the glenohumeral joint. (P. Ex. 2)

The petitioner worked in a restricted capacity during this time. On October 2, 2006, the light-duty restrictions were terminated and she was released to full-duty work. The discharge diagnosis was a left shoulder strain and tendonitis. (P. Ex. 2)

The petitioner returned to her regular position with the respondent. She testified she was on pain medication; however, the work status form issued October 2, 2006 does not list any medications being prescribed.

On March 5, 2007, the petitioner returned to Westlake with complaints of pain in the left side of her neck, left shoulder and arm. The history describes heavy lifting of approximately 50 pounds at work that was present for a day after the lifting. She denied any direct trauma or a fall. Examination of the neck demonstrated tenderness in the left trapezius and rhomboid without spasm and a full range of motion. Examination of the shoulder demonstrated a full range of motion in all planes. Strength [*9] was 5/5 in all planes. The elbow, wrist and digits were non-tender with a full range of motion. Her grip strength was 5/5. She was neurovascularly intact bilaterally. The impression was left neck and shoulder pain that was musculoskeletal. She was placed on light duty and prescribed medications. (P. Ex. 2.)

On March 14, 2007, the petitioner saw Dr. Ruiz-Pla for complaints of depression and left shoulder pain after her August 2006 accident. Dr. Ruiz-Pla recommended a psychiatric evaluation and took her off work for four weeks. (P. Ex. 1.) The petitioner neither testified that she had a psychiatric consultation nor introduced psychiatric records into evidence.

The petitioner continued to work under the restrictions. According to the records, she had physical therapy at Westlake beginning on March 13, 2007. In a note dated March 13, 2007, the therapist wrote that the patient was not responding to treatment with respect to pain and range of motion and would defer to her doctor for continued therapy. The next record is a note dated April 12, 2007, which confirmed a discharge from therapy, effective March 13, 2007. (P. Ex. 2)

An MRI of the cervical spine was taken on April 4, 2007, which [*10] demonstrated a minimal protrusion of the C5-6 disc, no evidence of spinal stenosis and an intrinsically normal spinal cord. (P. Ex. 4 and 5.) She was examined at Westlake on April 5, 2007. She remained on light-duty restrictions, prescribed medication and advised to see an orthopedic physician.

A written referral was sent by physician's assistant S. Heather Venamore at Westlake to orthopedic surgeon Julie Wehner, M.D. The letter described the history, treatment, and MRI scans. The letter also comments that at the last appointment on April 5, 2007, the patient was noted to have an exaggerated presentation with noted giving way to light touch. Objectively, the patient had left paraspinal, trapezius and rhomboid tenderness with mild trapezius spasm. Her active ROM of the left shoulder was guarded actively and resisted passively. (R. Ex. 17.)

The first appointment with Dr. Wehner was on May 3, 2007. Dr. Wehner's history describes the two accidents. The petitioner complained of pain on the base and left side of her neck radiating out to her shoulder and down to her arm on the left side. Examination of the neck demonstrated a full range of motion with some exaggerated posturing and some [*11] grimacing. There was a full, active shoulder range of motion. There was some diffuse give away weakness. The biceps, triceps and brachioradialis were 1+ and symmetric. Dr. Wehner reviewed the MRI's of the shoulder, taken in September 2006, and of the cervical spine, taken in April 2007. (R. Ex. 17.)

Dr. Wehner diagnosed a cervical and left shoulder sprain. In her letter to Dr. Meeks at Westlake, she noted that the patient's subjective complaints appeared out of proportion to the radiographic findings. Dr. Wehner was concerned that the patient continued to voluntarily restrict her shoulder range of motion and might develop adhesive capsulitis. She recommended continued physical therapy. She maintained the light-duty work restrictions. The petitioner was to return in two weeks. (R. Ex. 17.)

The petitioner returned to Dr. Wehner on May 17, 2007. She had shoulder and neck pain, but looked better. She was not holding her arm stiff or her neck stiff. Her arm range of motion with flexion was 130 degrees and abduction was 160 degrees. Upper extremity strength showed diffuse giving way on the left side. There was no atrophy or edema. Dr. Wehner recommended the patient return to work at full [*12] duty and pursue a home exercise program. Dr. Wehner did not believe any further physical therapy would accelerate her healing process. (R. Ex. 17.)

On June 6, 2007, petitioner saw orthopedic surgeon Jeffrey S. Meisles, M.D., for her left shoulder and elbow. He allowed her to return to work with restrictions of no work over chest height and no lifting greater than 10 pounds with her left arm. In a letter to Dr. Ruiz, Dr. Meisles discussed the history, course of treatment, MRI scans, Dr. Wehner's consultation and his examination findings. He noted that with active motion the patient complained of some discomfort with flexion beyond about 130 degrees. There was no weakness to resisted external rotation at neutral. There was a mildly positive impingement sign and he injected her subacromial space. Her hand grip strength on the left was less than the right. Her biceps strength was slightly less on the left than the right and her triceps strength was equal. Upper extremity reflexes were normal. Spurling's test was negative. Her physical examination was suggestive of slight symptom magnification. (P. Ex. 7.)

The petitioner continued under the care of Dr. Meisles. She began therapy at Accelerated [*13] Rehabilitation on June 19, 2007. (P. Ex. 8.) She continued working for the respondent.

On July 11, 2007, she saw Dr. Meisles who expressed concern that her symptoms did not improve as she continued to work at a job that required repetitive motion and overhead work. He noted that she had no improvement following the injection he administered. For that reason he did not believe she would benefit from an acromioplasty. He opined that her symptoms were benign and self-limiting and would resolve over time with appropriate workplace modification. (P. Ex. 7.)

She was discharged from therapy at Accelerated Rehab. on July 31, 2007. The therapist's assessment was that the patient was progressing minimally towards pain goals but was able to return to work full duty. The recommendation was discharge to a home exercise program. (P. Ex. 8.)

Dr. Meisles examined the petitioner again on August 1, 2007. Her examination was unchanged. She complained of pain in the lateral aspect of her chest wall, the posterior aspect of her shoulder and the lateral aspect of her shoulder. Dr. Meisles reviewed the physical therapy report which indicated that the patient had some pain behavior, but that she had essentially [*14] reached a point in terms of her physical capabilities that she could return to work without restriction. He told her that he did not think her complaints correlated well with her physical findings and MRI findings. He told her he saw no contraindications of her returning to work without restrictions. He did not believe surgery would be likely to be of benefit to her. He suggested she obtain a second opinion if she had any concerns regarding his findings. He released her to full-duty work, effective August 2, 2007.
(P. Ex. 8.)

On October 30, 2007 the petitioner saw Victor M. Romano, M.D., an orthopedic surgeon. Dr. Romano's records contain a history that in June 2007, the petitioner was lifting heavy boxes and then complained of pain in her left shoulder. His examination demonstrated a full range of motion of the neck with no pain. There was a full range of motion of the shoulder with a positive impingement sign and mild weakness of the rotator cuff. He diagnosed rotator cuff syndrome and DeQuervain's syndrome. He ordered a course of physical therapy and a wrist brace for her hand. (P. Ex 9)

There is no record of her attending any therapy following the first appointment with Dr. Romano. [*15] On December 21, 2007, she had an MRI arthrogram that demonstrated a very small full thickness tear of the leading edge of the supraspinatus. The remaining rotator cuff tendons were intact. (P. Ex. 9.)

Based on this study, Dr. Romano scheduled her for surgery which he performed on February 1, 2008. The surgery was a left shoulder arthroscopy and debridement of the labrum and rotator cuff repair. The petitioner continued under the care of Dr. Romano. She was taken off work. She began physical therapy on February 5, 2008. (P. Ex. 9.)

On March 11, 2008, Dr. Romano released her to work at light duty, which the respondent was able to provide. These restrictions were in effect until she was examined on April 22, 2008. Dr. Romano felt that her shoulder was improving. He had her continue in therapy. He allowed her to return to work at full duty. (P. Ex. 9.) He examined her again on May 20, 2008. Dr. Romano felt that she was progressing well. He prescribed physical therapy three times a week for six more weeks. He continued to allow her to work full duty. (P. Ex. 9.)

During this time the respondent's human resources manager, Roy Gabriel Pinzon, began to discover that there were discrepancies [*16] in employees' I-9 files with respect to documentation establishing the individuals' legal ability to work in the United States. Mr. Pinzon testified that because of these discrepancies, he conducted an audit and discovered that a number of employees did not have the appropriate documentation to support their work status. The petitioner was one of these employees.

Mr. Pinzon testified that he was familiar with the petitioner. At the time he started with the respondent in February 2008, she was off work. He testified that she returned to work with restrictions from her doctor. Her regular position was in the finishing and gluing department. After reviewing the restrictions, respondent found a position in what they called the "set up box" department.

Mr. Pinzon testified that the I-9 form contains three lists on the back of the form. List A is for new employees who provide one of the types of documents to prove that he or she can work legally in the United States. The document can be a passport or an alien resident card. Mr. Pinzon testified that Lists B and C are different than List A. Lists B and C require that more than one document be submitted by the individual, such as a driver's [*17] license and a social security card or a birth certificate.

After conducting his audit, Mr. Pinzon consulted with corporate officials in Virginia. The decision was made to notify the employees and to require each of them to provide original documentation in order to demonstrate that he or she can work legally in the United States.

Mr. Pinzon discovered a discrepancy with the petitioner's I-9 documentation. On July 8, 2008, Mr. Pinzon sent letters to all employees whose I-9 files had discrepancies, including the petitioner. (R. Ex. 21.) The letter informed these individuals that their eligibility documentation had expired or was missing and that they had to submit original documentation no later than July 11, 2008. Failure to comply would jeopardize employment status. Mr. Pinzon also prepared a list of employees whose documentation was appropriate and a list of employees whose documentation was not appropriate. (R. Ex. 21.)

Mr. Pinzon testified that Ms. Lopez came to his office after receiving the letter and explained that Ms. Lopez did not have documentation to establish her eligibility to work legally in the United States. He testified that she told him that she had a social security [*18] number that was valid, but that it was not valid for employment purposes. Upon

hearing this Mr. Pinzon informed the petitioner that there was no way he could legally keep her employed. Mr. Pinzon testified the petitioner tendered a resignation which he accepted. He sent her a letter confirming the termination on September 25, 2008 (R. Ex. 13.) Mr. Pinzon testified the position the petitioner was working during this time in accordance with her restrictions would have continued to be available to her had she provided the appropriate documentation.

The petitioner admitted that she was not able to provide documentation that she was able to work legally in the United States and that she left her job for that reason. The petitioner admitted she is not legally allowed to work in the United States.

The petitioner identified her employment application with the respondent, dated August 9, 2002. (R. Ex. 6.) The application asked if the applicant had the legal right to remain and work in the United States to which the petitioner marked "Yes".

On July 8, 2008, the petitioner saw Dr. Romano and informed him that she was doing better, except for work. She was to return to Dr. Romano in one month. [*19] He put her on a 20 pound lifting limitation. (P. Ex. 9.)

On July 30, 2008, petitioner underwent a functional capacity evaluation ("FCE"). The therapist did not feel able to fully assess her ability to return to work because he was not provided with a written job description. Based on oral representations, the therapist recommended that modifications be made with respect to pounds lifted and carried, as well as to repetitive, elevated activity. (R. Ex. 15.)

She returned to Dr. Romano on July 31, 2008 and told him that she was no longer employed. Dr. Romano agreed with the FCE results which allowed her to return to work with limitations on overhead lifting, heavy lifting or repetitive motions involving her left arm. He gave her a prescription for an EMG due to a concern that she had a cervical radiculopathy. (P. Ex. 9.)

The petitioner underwent an upper extremity EMG on August 5, 2008. Dr. Romano reviewed the results. At the August 12, 2008 appointment, Dr. Romano opined that the EMG was negative. The report was not introduced into evidence. Dr. Romano's impression was that the patient was about six months status/post left shoulder arthroscopic rotator cuff repair and was near maximum [*20] medical improvement. He recommended that she work within the results of the FCE, which limited overhead lifting, heavy lifting or repetitive activity involving the left arm. He gave her a prescription for physical therapy. He discharged her from his care. (P. Ex. 9.)

On August 28, 2008, the respondent arranged for an examination with Jay Pomerance, M.D., a specialist in hand and upper extremity surgery. Dr. Pomerance felt her treatment was consistent with that practiced in the medical community. He needed an accurate job description to determine a causal relationship. He commented that because she was reporting significant symptoms, one could consider a contrast-enhanced, repeat MRI or arthrogram, or in the alternative, an ultrasound. (R. Ex. 10.)

The petitioner returned to Dr. Romano on October 28, 2008. She had a full range of motion of the shoulder, mild impingement and mild rotator cuff weakness. Neurovascular was intact. He felt that petitioner had persistent weakness of the shoulder and was at maximum medical improvement. He felt she could continue working light duty in accordance with the functional capacity evaluation. (R. Ex. 19.)

Dr. Pomerance issued a report on November [*21] 18, 2008 in which discusses his viewing of a job video of the petitioner's position in the Feeder/Catcher department. This was her regular position. He found the written job description similar to the video. He observed that the heaviest item lifted was 35 pounds and that with heavier weights, employees used assistive devices. He noted occasional work above shoulder level. Thousands of cartons were produced per worker in an average shift. He determined that the job duties were in a medium-duty classification as defined by the dictionary of occupational titles.

In Dr. Pomerance's opinion, the petitioner had pre-existing degenerative changes in her shoulder and AC joint, along with a downward-sloping acromion. All of this was documented by her MRI. These are factors that would contribute to the development of her shoulder impingement and rotator cuff tear. He also felt that her job duties may have contributed to her shoulder condition based on the weights that she handled and the high volume of objects that she processed in an average workday. (R. Ex. 11.)

On December 1, 2008, the petitioner secured employment with QC Finishers. She started at $ 7.50 per hour and worked 40 hours a week. [*22] She received an increase to $ 8.00 per hour. Respondent's Exhibits # 2 and # 3 show that she was employed through May 22, 2009. Petitioner testified that she was then laid off from this job.

Dr. Pomerance examined the petitioner again on January 25, 2009. He felt that the patient's symptoms were similar to those of his first evaluation. He recommended an MRI of the shoulder to evaluate the complaints. He estimated that a 15 pound lifting limitation would be reasonable until the results of the MRI were available. (R. Ex. 12.)

The petitioner had no further medical treatment until July 23, 2009 when she returned to Dr. Romano. He ordered an MRI arthrogram out of concern that she might have a recurrent rotator cuff tear. He also continued to allow her to work with a 20 pound lifting limitation and no overhead activity. (R. Ex. 16.)

The MRI arthrogram was taken on August 13, 2009. This demonstrated tendinosis of the distal supraspinatus and infraspinatus tendons without evidence of a tear. There were some post-surgical signals. No new labrum tear was identified. Some fluid was observed that was considered to be mild bursitis. (R. Ex. 20.)

She returned to Dr. Romano on September 8, 2009. [*23] He felt that the arthrogram showed no tears and revealed some post-surgical changes. She had a good range of motion on exam with a mild apprehension sign. Her strength was very good. He again stated she was at maximum medical improvement. He wanted her to continue doing home exercises. She could continue to work light duty in accordance with the FCE. She was discharged to return as needed. (P. Ex. 22.)

The petitioner testified that she looked for employment after being laid off at QC Finishers. She testified to contacting staffing agencies. Petitioner's Exhibit # 26 contains copies of five business cards she testified she contacted. She admitted that she has not looked for work since February 2010.

Her attorney arranged for a vocational assessment with Steven M. Blumenthal. In his report dated February 16, 2010, Mr. Blumenthal concluded that, given her 20 pound lifting limitation, the petitioner would not have access to a stable labor market in the factory/manufacturing environment. He did feel that with job-readiness training, she could be placed in a restaurant setting as a food preparation worker earning $ 8.00 per hour. He noted that because she is an undocumented worker, he would [*24] not be able to directly contact employers on her behalf. (P. Ex. 23.)

CONCLUSIONS OF LAW

With regard to Issue B: "Was there an employee-employer relationship?", the Arbitrator concludes:

The Arbitrator concludes that an employee-employer relationship existed between the petitioner and respondent on both accident dates. With regard to this particular issue, the Arbitrator relies on the conclusions reached by the Appellate Court in *Economy Packing Co. v. Illinois Workers' Compensation Commission, 387 Ill. App. 3d 283, 901 N.E.2d 915, 327 Ill. Dec. 182 (2008).* The Arbitrator also relies on Sections 1(b) of the Illinois Workers' Compensation Act. Section 1(b)1 defines the term "employee." Section 1(b)2 identifies those over whom the Act has jurisdiction, and includes the word "aliens."

With regard to Issue C: "Did an accident occur that arose out of and in the course of petitioner's employment by respondent?", the Arbitrator concludes:

The respondent disputes that petitioner sustained accidental injuries that arose out of and in the course of her employment "with respect to the left wrist + neck." (A. Ex. 1)

With respect [*25] to Arbitrator's Exhibit # 1, the Arbitrator deduces that respondent has stipulated to August 1, 2006 and March 5, 2007 accidental injuries to petitioner's left shoulder. Furthermore, the petitioner's testimony and the medical records clearly support accidental injuries to her left shoulder on these dates.

Therefore, the Arbitrator concludes that on August 1, 2006 and March 5, 2007, the petitioner sustained accidental injuries to her left shoulder that arose out of and in the course of her employment by the respondent.

The Arbitrator will address issues related to the left wrist and neck in the following section on causation.

With regard to Issue F: "Is petitioner's current condition of ill-being causally related to the injury?", the Arbitrator concludes:

According to Arbitrator's Exhibit # 1, the respondent disputes a causal connection between petitioner's current conditions of ill-being *of her neck and left wrist* - - and the accidents of August 1, 2006 and March 5, 2007.

In the August 1, 2006, records from Westlake Occupational Health Department, petitioner complained of left upper arm pain with radiation to her left wrist. The history indicates that the pain would usually [*26] occur after eight hours of work as a packer, that it has been persistent for eight months but that she was not sure of the date of onset. She denied any paralysis, paresthesias or muscle weakness at that time. The impression of R. DiSanto, P.A.C. was "QUESTIONABLE LEFT LATERAL EPICONDYLITIS, LEFT SHOULDER STRAIN." The doctor prescribed Motrin and placed her on light-duty work. Petitioner underwent a short course of physical therapy and an MRI of her left shoulder. On October 2, 2006, the Westlake Hospital physician rendered a diagnosis of "left shoulder pain/tendinitis resolved," discharged her from care and released to her to return to full-duty work. The Westlake doctor did not render diagnoses that related to any condition of petitioner's neck or her left wrist. (P. Ex. 1, P. Ex. 2)

On March 5, 2007, the petitioner returned to Westlake Hospital and complained of left-sided neck, shoulder and arm pain. The history indicates that petitioner stated that the pain is secondary to heavy lifting of approximately 50 pounds at work which she has to do repetitively as she works in the packing department. She denied direct trauma. She denied falling down. The physician prescribed medication [*27] and physical therapy and ordered cervical and left shoulder MRIs. The cervical MRI was interpreted as showing (1) minimal protrusion of the C5-6 disc, (2) no evidence of spinal stenosis and (3) intrinsically normal spinal cord. (P. Ex. 5) The left shoulder MRI was interpreted as showing (1) tendinosis of the supraspinatus tendon, and (2) minimal fluid in the glenohumeral joint. (P. Ex. 4)

In a report dated November 18, 2008, Dr. Pomerance wrote that petitioner's job duties "may have had some contribution to the shoulder condition based on the weights handled and the high volume of objects processed in an average work day." (R. Ex. 11)

Based on A. Ex. 1, as well as on petitioner's testimony and the medical records, the Arbitrator concludes that a causal relationship exists between petitioner's current condition of ill-being of her left shoulder and the accidents of August 1, 2006 and March 5, 2007.

In May 2007, when orthopedic surgeon Julie Wehner first evaluated the petitioner, she diagnosed petitioner with cervicalgia. (P. Ex. 6)

Then, on June 6, 2007, orthopedic surgeon Jeffrey S. Meisles diagnosed petitioner with impingement syndrome of the left shoulder with rotator cuff tendonitis. [*28] (P. Ex. 7)

Dr. Meisles' July 11, 2007 records indicate that petitioner also has "pain in the radial aspect of her wrist that's bothered by the repetitive motion that she does at work." He opined that her shoulder and wrist pain are due to

tendonitis and diagnosed her with impingement of the left shoulder and mild DeQuervain's of the left wrist. He explained to her that it's very unlikely that her symptoms will improve if she continues to work in a job requiring repetitive motion and overhead work, and suggested that she seek alternative employment opportunities. He recommended a splint for her left hand at night. He injected her shoulder which the petitioner claimed did not help. He arranged for therapy which was focused on the left arm. (Id.)

When Dr. Meisles saw Maria Lopez her for the final time on August 1, 2007, he told her he did not think her complaints correlated well with her physical findings and the MRI findings. He told her that he saw no contraindications of her returning to work without restrictions. He did not believe surgery would likely benefit her since she had a lack of response to the subacromial cortisone injection. He suggested that she obtain a second opinion [*29] if she had any concerns regarding his findings. He released her to full-duty work, effective August 2, 2007. (Id.)

On October 30, 2007, orthopedic surgeon Victor Romano began treating the petitioner. One of Dr. Romano's findings during his examination was a full range of motion of the neck with no pain. He diagnosed the petitioner with rotator cuff tendonitis as well as DeQuervain's syndrome. Although he prescribed a brace for her left wrist, Dr. Romano focused his treatment on her left arm and performed surgery to repair her rotator cuff. While he was concerned at one point that there might be cervical radiculopathy, he found the EMG to be negative. Dr. Romano did not actually treat her cervical condition and the therapy he ordered was directed to the left arm. (P. Ex. 9)

On January 29, 2008, Dr. Romano wrote "An MRI of the neck is essentially unremarkable ..." (Id.)

The Arbitrator notes that there was no testimony from the petitioner that she injured her left wrist in the accident of March 5, 2007.

Neither Dr. Romano's records nor Dr. Meisles' records provide a work history or an opinion that the accident of March 5, 2007 caused or contributed to her DeQuervain's syndrome.

Based [*30] on the foregoing, the Arbitrator concludes that petitioner failed to prove that a causal relationship exists between any current condition of ill-being of her left hand, left wrist or neck and the accidents of August 1, 2006 or March 5, 2007.

With respect to Issue G: "What were petitioner's earnings?", the Arbitrator concludes:

In a single Request for Hearing document which the parties completed for both accidents, the petitioner claims that "her earnings during the preceding year were $ 28,854.28, and the average weekly wage, calculated pursuant to Section 10 of the Act, was $ 554.89." The respondent disputes this figure and claims that the average weekly wage was "$ 428.40." (A. Ex. 1)

The dispute over the average weekly wage is based on whether the overtime hours that petitioner worked should be included in the calculation.

The petitioner testified that in August 2006, she worked 8-10 hours daily and 46-48 hours weekly.

Petitioner further testified that she worked the same number of hours in March 2007 that she worked in August 2006. She testified that in March 2007, she earned $ 11.91/hour.

Petitioner testified that she was paid time and a half and overtime wages, and that [*31] in 2006 and 2007, she regularly worked overtime hours. Petitioner testified that if she refused overtime work, she would have problems with her supervisor. She stated that "we could not say no to overtime . . . it was mandatory."

Roy Gabriel Pinzon, the respondent's human resources manager, testified that he was familiar with the overtime requirements implemented by the respondent. He testified that when overtime hours were needed, the supervisors would

ask for volunteers. If they did not have enough volunteers, the supervisors would require employees to work overtime based on production needs.

However, in respondent's offer of employment letter, dated August 19, 2002 and signed by Maria Lopez and respondent's representative, Armando Segovia, it states: "Overtime will be required as needed." (P. Ex. 28)

Respondent's Exhibit # 14 is a record of petitioner's weekly earnings for the weekly pay period ending 8/7/05 through the weekly pay period ending 7/30/06.

Respondent did not offer wage records to refute petitioner's claim that she earned $ 11.91 per hour in March 2007. Respondent did not offer wage records to refute petitioner's testimony that for the period of 7/31/06 through 3/4/07, [*32] she worked 6-7 hours of overtime per week.

A review of R. Ex. 14 reveals that for the vast majority of these 52 weeks, petitioner worked at least six overtime hours per week. There are also occasions in which she worked overtime hours but did not work a full 40 hours of straight time.

Section 10 specifically excludes overtime from the calculation of the employee's average weekly wage. The Appellate Court has interpreted the overtime exclusion to include those hours "in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week." *Airborne Express, Inc., v. Illinois Workers' Compensation Commission, 372 Ill. App. 3d 549 at 554, 865 N.E.2d 979, 310 Ill. Dec. 259 (1st Dist. 2007)*

The Arbitrator distinguishes this case from Airborne in that there is no evidence in the instant case that respondent had a system for administering overtime. In Airborne, the company first offered overtime work to those employees with the most seniority and gave such employees the option [*33] of declining such work. In general, overtime work was only mandatory for those employees with the least seniority.

In considering Mr. Pinzon's testimony, the Arbitrator notes that had there been voluntary overtime, there is no evidence of the number of hours that petitioner would have worked voluntary overtime v. mandatory overtime.

The Arbitrator finds respondent's statement in their offer of employment letter - -" Overtime will be required as needed" - - to be a most compelling piece of evidence.

Therefore, the Arbitrator finds that overtime hours should be included in the calculation of average weekly wage, but at the straight-time rate.

In examining R. Ex. 14, the Arbitrator notes that on 8/7/05, petitioner's straight-time hourly rate was $ 9.67 per hour. As of 8/28/05, petitioner's straight-time hourly rate was $ 10.67 per hour. As of 2/12/06, petitioner's straight-time hourly rate was $ 11.21 per hour.

Therefore, for the August 1, 2006 accident, the Arbitrator concludes that petitioner's average weekly wage was:

($ 9.67 times 128.75 hrs.)+($ 10.67 times 1,113.25 hrs.)+($ 11.21 times 1,098.25 hrs.) / 52 weeks = $ 489.13

Then, for the March 5, 2007 accident, the Arbitrator [*34] uses the hours and the wage rates from the week ending 3/12/06 through the week ending 3/4/07. The data for the period 3/12/06 through 7/30/06 is in R. Ex. 14. For the remaining period, the only evidence that the Arbitrator has available to him is the petitioner' testimony. So, the Arbitrator concludes that the average weekly wage for the March 5, 2007 accident was:

($ 11.21 times 906.50 hours) + ($ 11.91 times 1,441.50 hours) / 52 weeks = $ 525.58

With respect to Issue J: "Were the medical services that were provided to petitioner reasonable and

necessary? Has respondent paid all appropriate charges for all reasonable and necessary medical services?", the Arbitrator concludes:

The Arbitrator finds that medical expenses were not an issue for the accident of August 1, 2006. The bills that petitioner is claiming are for services that followed the accident of March 5, 2007.

Dr. Meeks' physician's assistant wrote to Dr. Wehner and told her that the petitioner had an exaggerated presentation.

In her letter to Dr. Meeks at Westlake, Dr. Wehner noted that the patient's subjective complaints appeared out of proportion to the radiographic findings. Dr. Wehner opined that there [*35] is no indication for any type of surgical intervention. (R. Ex. 17)

After he gave the petitioner a left subacromial injection, Dr. Meisles opined that he did not think that Maria Lopez would benefit from an acromioplasty, given her lack of response to such injection. Dr. Meisles later opined that petitioner's complaints did not correlate well with her physical findings and MRI findings.

However, Dr. Meisles rendered his opinions before petitioner underwent an MR arthrogram of her left shoulder.

Dr. Romano's January 8, 2008 records indicate the following left shoulder MR arthrogram results:

(1) Very small full thickness tear leading edge supraspinatus, remaining rotator cuff tendon intact
(2) Small focal tear posterior superior labrum
(3) Low-grade tendinopathy intracapsular biceps. (P. Ex. 9)

On January 29, 2008, when Dr. Romano next saw the petitioner, he wrote that she has done therapy and has persistent pain in the shoulder. He also wrote that she has difficulty doing her job and that the pain wakes her up at night. Dr. Romano noted that the MRI of the shoulder shows a complete rotator cuff tear. Dr. Romano presented treatment options to the petitioner and explained the risks [*36] and benefits of the surgery. Petitioner elected to proceed with the arthroscopy and rotator cuff repair. (Id.)

On February 1, 2008, Dr. Romano performed a left shoulder arthroscopy and debridement of the labrum, as well as an open rotator cuff repair, on the petitioner. In the course of surgery, Dr. Romano observed that the labrum was intact, but found "fraying and tearing in the posterior portion of the labrum with a small attachment to the glenoid." Dr. Romano further observed that "the rotator cuff was torn 3/4 of the way, about 1 cm., on the attachment of the supraspinatus." Dr. Romano's post-operative diagnoses were "Labral tear, right (sic) shoulder, Left shoulder with rotator cuff repair." (Id.)

In a report dated August 28, 2008, Dr. Pomerance wrote that petitioner "believes the surgery has not significantly help (sic)." He further wrote that "the motion and strength in her shoulder is worse than it was prior to surgery and the pain complaints are unchanged other than the burning discomfort being somewhat relieved." (R. Ex. 10) Dr. Pomerance further wrote: "Standard and customary treatment for full thickness shoulder rotator cuff tears is surgery in the form of either an open [*37] or arthroscopic repair." (Id.)

The Arbitrator concludes that the surgery that Dr. Romano performed and the follow-up care that he prescribed was reasonably required to cure or relieve from the effects of the accidental injuries, as provided for in Section 8(a) of the Act.

In regard to the specific bills introduced, the Arbitrator makes the following findings:

The bill from Loyola University Medical Center (P. Ex. 13.) in the amount of $ 2,220.22 is denied as it has already been paid. There is a $ 10.00 Patient Balance. However, Respondent's Exhibit # 7 is a printout of medical bills that

respondent has paid as of 5/12/10. The Arbitrator finds that respondent has paid $ 3,427.71 in medical bills to Loyola University Medical Center, which includes a 3/22/10 refund of $ 295.63.

P. Ex. 14, Dr. Romano's bill for treatment from October 30, 2007 through February 11, 2008 in the amount of $ 7,666.00 is denied. The statement date in P. Ex. 14 is "02/14/08." The respondent has demonstrated proof of payment in Petitioner's Exhibit # 9. In the subpoenaed records of Dr. Romano, there is a statement dated "10/20/08" which shows dates of service through August 12, 2008 with a zero dollar balance. [*38] (P. Ex. 9)

P. Ex. 15 is the bill from Resurrection/West Suburban Medical Center for the surgery on February 1, 2008 in the amount of $ 21,538.24. According to the bill, payment was made in the amount of $ 20,739.24. There is a balance of $ 799.00. Therefore, the Arbitrator awards the petitioner $ 799.00.

P. Ex. 16. is a collection notice for the balance of the bill in P. Ex. 15 - - the amount of $ 799.99 - - that the Arbitrator has just awarded.

P. Ex. 17 is a collection notice from Resurrection/Westlake Hospital for services on April 1, 2008 in the amount of $ 3,668.66, for services on May 2, 2008 in the amount of $ 2,766.60 and for services on June 3, 2008 in the amount of $ 2418.92. The Arbitrator denies these since they are collection notices and not itemized bills. Moreover, the latest date of service in the Westlake Hospital records is April 12, 2007 (P. Ex. 2) and the latest date of service in the Resurrection/Westlake Physical Therapy records is March 19, 2007. There is no evidence from Resurrection/Westlake Hospital to support the charges for the April 1, 2008, May 2, 2008 and June 3, 2008 dates of service. There is no evidence that any such treatment was related to petitioner's [*39] accidental injuries of August 1, 2006 and March 5, 2007. All that identified in Patient Service is "RECURRING OUTPATIENT."

P. Ex. 18 is a bill from Professional Anesthesia in the amount of $ 2,880.00 for the anesthesia services provided on 2/1/08, the date of petitioner's left shoulder surgery. The bill shows that payment was made in the amount of $ 799.04 with a commercial adjustment taken in the amount of $ 1,881.20. The Arbitrator awards the balance of $ 199.76 to the petitioner.

P. Ex. 19 is a bill from Dr. Meisles with a statement date of 03/20/09. The Arbitrator denies this bill for the reason that it shows payment on its face by the respondent in full and a zero dollar balance.

Therefore, the Arbitrator awards the petitioner $ 998.76 (=$ 799.00 + $ 199.76), subject to the provisions in Sections 8(a) and 8.2 of the Act, as amended.

With respect to Issue K: "What temporary benefits are in dispute?", the Arbitrator concludes:

In Arbitrator's Exhibit # 1:

TTD CLAIMED [Tilde] Petitioner claims to be owed temporary total disability benefits (TTD) for the following periods: 2/1/08-3/11/08 and 7/13/08-11/30/08. Respondent disputes and claims TTD NOT OWED for 2/1/08-3/11/08 and [*40] 7/13/08-11/30/08.

TPD CLAIMED [Tilde] Petitioner claims to be owed temporary partial disability benefits (TPD) for the following periods: 12/2/08-5/22/09. Respondent disputes and claims that no TPD is owed.

MAINTENANCE CLAIMED [Tilde] Petitioner claims to be owed maintenance benefits from "5/23/09-5/13/10 and going." Respondent disputes and claims that no maintenance benefits are owed because petitioner quit her job.

TTD OWED

As the Arbitrator has found that the surgery and follow-up care that petitioner underwent was reasonably required to cure or relieve from the effects of the accidental injuries, he concludes that petitioner is entitled to TTD benefits from

2/1/08 through 3/11/08.

Since petitioner was separated from her employment with respondent before she had reached maximum medical improvement ("MMI"), the Arbitrator concludes that petitioner is entitled to TTD benefits from 7/13/08 through 10/28/08 (R. Ex. 19)

In *Interstate Scaffolding, Inc. v. Illinois Workers Compensation Commission, 236 Ill. 2d 132, 923 N.E.2d 266, 337 Ill. Dec. 707 (2010),* the Supreme Court held:

> Whether an employee has been discharged [*41] for a valid cause, or whether the discharge violates some public policy, are matters foreign to workers' compensation cases. An injured employee's entitlement to TTD benefits is a completely separate issue and may not be conditioned on the propriety of the discharge. For the reasons stated above, we hold that an employer's obligation to pay TTD benefits to an injured employee does not cease because the employee had been discharged - - whether or not the discharge was for "cause." When an injured employee has been discharged by his employer, the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits.

The respondent points out that in Interstate Scaffolding, the claimant's employment was terminated after claimant had written some religious "graffiti" or slogans in a storage room on Interstate's premises whereas in the instant case, petitioner resigned her position because she failed to provide proper documentation to establish her [*42] eligibility to legally work in the United States. The Arbitrator reiterates Mr. Pinzon's unrebutted testimony that petitioner told him that the social security number she had previously submitted to respondent was valid, but that it was not valid for employment purposes.

The Arbitrator relies on the conclusions reached by the Court in Interstate Scaffolding, and notes that Maria Lopez did not reach MMI until October 28, 2008.

The respondent is due a credit of $ 2,283.61 for net short-term disability benefits that they have paid.

TPD OWED

After her employment with respondent, petitioner worked for QC Finishers from December 2, 2008 through May 4, 2009, at which time she was laid off. In Arbitrator's Exhibit # 1, petitioner claimed a TPD period of 12/2/08 through 5/22/09. Yet, petitioner testified that the last day she actually worked at QC Finishers was May 4, 2009, although she received her last paycheck on May 22, 2009. Also, QC Finishers' absentee calendar indicates that petitioner began working on 12/1/08, and over the course of her employment there, took nine days off (vacation days, holidays and a sick day). So, the Arbitrator concludes that in calculating the weeks and [*43] parts thereof, the petitioner worked at QC Finishers from December 1, 2008 through May 4, 2009, or 22-2/7 weeks, less 1-2/7 weeks, or 21 weeks.

Therefore, if one adds the final totals of $ 600.00 (from 12/1/08-12/31/08) to $ 2,688.00 (from 1/1/09-2/28/09) to $ 2,296.00 (from 3/1/09 through 7/31/09), and divides that sum by 21, one receives an AWW at QC Finishers of $ 265.90. (R. Ex. 2, R. Ex. 3)

The TPD rate would be ($ 525.58 - $ 265.90) = $ 259.68 times 2/3 = $ 173.12.

MAINTENANCE OWED

The Arbitrator concludes that petitioner is entitled to maintenance benefits from October 29, 2008 through November 30, 2008, and from May 5, 2009 through May 13, 2010. Petitioner testified that she earns, and has earned,

occasional wages as a babysitter. Petitioner testified that she has conducted a job search and submitted Petitioner's Exhibit # 26 as evidence thereof.

With regard to Issue O: "Other--Vocational rehabilitation and placement services", the Arbitrator concludes:

On January 11, 2010, after having reviewed selected medical records, Certified Rehabilitation Counselor Steven M. Blumenthal conducted a vocational rehabilitation interview of the petitioner. He noted that she was educated [*44] through the sixth grade in Mexico, is 40 years old, holds a valid driver's license, has a reliable vehicle for transportation, would start ESL classes on January 14, 2010 and is motivated to return to work. (P. Ex. 23)

Mr. Blumenthal also completed an IC31, the Illinois Workers' Compensation Commission Rehabilitation Plan wherein he opined that rehabilitation is necessary for Maria Lopez to return to work since "Ms. Lopez has not been able to obtain stable employment post injury and has difficulty identifying appropriate placement goals by herself given her lack of English communication skills and her 20 lbs. lifting limitation." He felt that petitioner will require vocational counseling, job readiness training, and assistance in identifying appropriate employers to contact per the vocational rehabilitation report dated 2/16/10. (Id.)

Since the petitioner is not legally employable in the United States, the petitioner is not entitled to vocational placement.

Mr. Blumenthal has admitted that as petitioner is an undocumented worker in the United States, "we would be unable to directly contact employers on her behalf." Consequently, the Arbitrator questions the usefulness of Mr. Blumenthal's [*45] services. (Id.)

The Arbitrator concludes that vocational rehabilitation and placement services are not necessary.

With regard to Issue M: "Should penalties or fees be imposed upon Respondent?", the Arbitrator concludes:

The Arbitrator denies the petitioner's claims for penalties under Sections 19(k), 19(l) and attorneys' fees under Section 16. The Arbitrator finds that the respondent had a good faith basis to deny Dr. Romano's surgery based on the opinion of Dr. Meisles. It follows therefore that the respondent had a good faith basis to deny TTD benefits.

Furthermore, respondent argued that since petitioner resigned her employment with them, she was not entitled to TTD benefits.

The Arbitrator notes that the petitioner was paid some short-term disability benefits. Moreover, most of petitioner's medical bills were paid.

With regard to Issue L: "What is the nature and extent of the injury?", the Arbitrator concludes:

Petitioner argues that she is entitled to an odd-lot permanent total award, and cites *Economy Packing Co. v. Illinois Workers' Compensation Commission, 387 Ill. App. 3d 283, 901 N.E.2d 915, 327 Ill. Dec. 182 (2008).* [*46]

Both Ramona Navarro, the claimant in Economy Packing, and Maria Lopez, the petitioner in the case at bar, are undocumented, Spanish-speaking workers who suffered shoulder injuries at work.

However, in Economy Packing, the claimant testified that she was 60 years old and that prior to coming to the United States in 1982, she attended school for three years in Mexico before working on a farm. The claimant testified that she had not received any additional education beyond those three years. She further stated that she cannot speak, read or write English. She also does not drive an automobile. Claimant had been released to return to work with restrictions of no lifting over 10 pounds and no work above the shoulder. Yet, the Court pointed out that Arbitrator

Hagan specifically noted that the claimant "is obviously not employable", that "the medical evidence indicates that [the claimant] is limited to less than sedentary work" and that the vocational counselor retained by Economy Packing "admitted that [the claimant] is not a candidate for vocational rehabilitation."

In the case at bar, Steven Blumenthal noted that Maria Lopez was educated through the sixth grade in Mexico, is [*47] 40 years old, holds a valid driver's license, has a reliable vehicle for transportation, would start ESL classes on January 14, 2010, is motivated to return to work and has work restrictions of no lifting over 20 pounds and no overhead work. Petitioner reported to Mr. Blumenthal that she understands very little English and communicated in Spanish at work. Following her shoulder surgery and rehabilitation, petitioner returned to work for less pay at QC Finishers and earned occasional wages as a babysitter. Although Mr. Blumenthal believes that petitioner is a candidate for vocational rehabilitation, he would be unable to place her in a job.

Based on the foregoing, the Arbitrator concludes that petitioner is not an odd-lot permanent total.

It is clear that petitioner has established at least a partial incapacity from pursuing her usual and customary line of employment as a packer.

The Arbitrator has found that for the March 5, 2007 accident, petitioner earned $ 525.58 in the full performance of her duties in the occupation in which she was engaged at the time of the accident.

The petitioner must prove the average amount that she is earning or is able to earn in some suitable employment [*48] after the accident. It is true that petitioner worked at QC Finishers after the accident and earned occasional wages as a babysitter.

By basing a wage differential award on a job in the U.S., the Arbitrator would presuppose that petitioner would actually be able to take the employment offered. However, petitioner is an undocumented worker. The Arbitrator is unwilling to sanction the illegal employment of the petitioner. Please see and *Miezio v. Z-Wawel Construction, 00 IIC 0341.*

In *Tamayo v. American Excelsior and Labor World, Inc., 99 IIC 0521,* the Commission found that claimant was entitled to vocational rehabilitation and retraining to allow her to return to work as a secretary in any country where she would be legally entitled to earn wages.

The Arbitrator takes judicial notice that, in general, wages in Mexico are lower than those in the U.S.

The Arbitrator draws the reasonable inference that it follows from Tamayo that, *ceteris paribus,* an undocumented worker from a lower-wage country, whether or not he or she returns to work in the homeland, would be entitled to a greater wage differential award than would [*49] a properly documented worker.

The Arbitrator concludes that as a result of the accidental injuries of August 1, 2006 and March 5, 2007, petitioner has suffered a loss of use of her left arm to the extent of 35% and a loss of trade, equal to 20% loss of use, man as a whole.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsNotice PeriodsWorkers' Compensation & SSDICompensabilityCourse of EmploymentGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

*12 IWCC 419; 2012 Ill. Wrk. Comp. LEXIS 327, **

MANUEL ROSAS, PETITIONER, v. GM WAREHOUSE, INC., RESPONDENT.

NO: 10WC 22555

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

12 IWCC 419; 2012 Ill. Wrk. Comp. LEXIS 327

April 23, 2012

CORE TERMS: pain, injections, medication, prescribed, conditioning, notice, light duty, box, discharged, bucket, pallet, extremity, lifting, radiculapathy, night, physical therapy, provider, treating, epidural, cheese, symptoms, lbs, recommended, underwent, warehouse, noticed, ongoing, alien, arbitration, herniation

JUDGES: David L. Gore; Mario Basurto; Michael P. Latz

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of Accident, Causal connection, Medical expenses, temporary total disability, permanent partial disability and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. On February 10, 2010 Petitioner was a General Laborer in Respondent's warehouse. His duties involved stocking and shipping to all Pete's Fresh Markets. Filling pallets and stocking trucks required heavy lifting on a daily basis. Boxes

weighed between 30 and 95 pounds. He would lift 20-30 ninety-pound boxes of meat per day, and would also lift 20-40 buckets of cheese weighing between 25 and 87 pounds per day.

2. Petitioner had no previous back pain. On the date in question, he felt a crack in the lower right side of his back while lifting an 87 pound bucket and twisting to place **[*2]** it on a pallet.

3. Petitioner reported to work for 2 days following the accident, but noticed pain every time he bent down to pick up a box. He also noticed pain in the back of his legs and knees. Petitioner took the following day off, and after a scheduled off day, took the next 2 days off as well. On the third day after his scheduled off day, Petitioner was sent to Mercy Works by his supervisor. There, he was prescribed medication and returned to work with restrictions. On February 23, 2010 Respondent accommodated Petitioner's **light duty** restrictions.

4. Petitioner's Manager, Efrain Carillo, indicated that Petitioner informed him of his accident. An accident report was drafted by Petitioner and signed by Mr. Carillo.

5. Petitioner treated at Mercy Works through March 8, 2010 with no improvement. He then underwent physical therapy through April 7, 2010. He worked during this time period. Petitioner then began treating with a Dr. Anderson, and after an MRI, was referred to Dr. Fisher. At that point Petitioner understood that he had suffered a herniated disc. Injections and medication were recommended. The injections were refused, however. Petitioner continued working despite having **[*3]** difficulty sleeping.

6. Petitioner was terminated on June 4, 2010 while still under restrictions and treating with Dr. Fisher. He was terminated because he was in the United States illegally, as he did not have a valid social security number.

7. Also on June 4, 2010 Petitioner began treating with Dr. Fuelleman at Marque Medicos. He complained of cramps and pain radiating down his ankle. Physical therapy, exercise, x-rays and an EMG were prescribed. Petitioner was taken off work and referred to a pain specialist, Dr. Engel. Dr. Engel prescribed injections, physical therapy and medication. Petitioner again declined the injections.

8. Therapy eventually decreased Petitioner's pain, and he was released to work with restrictions of no lifting over 20 pounds and no leaning over, bending or pulling on July 23, 2010. Petitioner then searched for work within his restrictions through temp agencies, but was unsuccessful.

9. After an IME with Dr. Bernstein on September 16, 2010, work conditioning and injections were recommended. Petitioner declined the injections. Work conditioning ended on December 1, 2010 and Dr. Engel discharged Petitioner at that time, as he was not reporting much pain.

[*4] 10. Petitioner returned to work at a factory on December 27, 2010. His duties were opening boxes and removing the products contained therein. The job also required him to lift 20 pound boxes over 300 times daily. His back would get tired during the performance of his duties. After moving around and twisting he would feel pain. He would take medication prescribed by Dr. Engel 3-4 times weekly.

11. Prior to the accident, Petitioner played sports recreationally, but no longer does so. He cannot sit in a car for long periods and no longer goes out dancing. He often takes medication to get to sleep. Petitioner no longer plays basketball at the level

he previously could, and cannot dance without taking frequent breaks. A home exercise and stretching program for 6 days a week has also been recommended for Petitioner.

12. At the time of trial, Petitioner worked for Chicago American Manufacturing. He packs fans for them. He began working there in late April of 2011.

The Commission affirms the Arbitrator's ruling finding accident. Petitioner's testimony was credible, and corroborated by Mr. Carillo, who acknowledged that an accident was reported to him.

The Commission also affirms the **[*5]** Arbitrator's ruling finding causal connection. This is based on Petitioner's youth, timeline of events, and the fact that Petitioner was asymptomatic prior to the accident. Moreover, Respondent's own IME physician, Dr. Bernstein, found causal connection to both Petitioner's back pain and radiculopathy.

The Commission also affirms the Arbitrator's award of medical expenses, as Respondent does not challenge the reasonableness and necessity of said bills.

The Commission also affirms the Arbitrator's temporary total disability award. On June 4, 2010 Petitioner was terminated while still under work restrictions from Dr. Fisher. On the same date, Petitioner was taken off work by Dr. Fuelleman, who, along with Dr. Engel, kept Petitioner off work through July 22, 2010. From July 23, 2010 through December 1, 2010 Petitioner was able to work with restrictions, but was not offered such work by Respondent. Petitioner conducted his own job search during this period, but was unable to secure work. Moreover, Petitioner is not precluded from accepting workers' compensation benefits simply because he is an undocumented alien. ***See* Economy Packing, 387 Ill.App.3d 283, 292 (2008). [*6]**

The Commission also affirms the Arbitrator's denial of Petitioner's Petition for Penalties and Fees. Although Respondent's denial of benefits was based on an incorrect reading of the holding in **Economy Packing,** Respondent's reliance on said holding was not unreasonable or vexatious.

The Commission, however, modifies the Arbitrator's permanent partial disability award. Petitioner underwent conservative treatment, including medication, physical therapy and work conditioning, and was eventually able to return to full duty. He still suffers from ongoing complaints of low back pain, and still takes medication for his condition. Petitioner also undergoes a home exercise and stretching program and can no longer enjoy hobbies in the same manner as he could prior to the accident. The Commission notes, however, that Petitioner repeatedly refused epidural injections recommended by Drs. Fisher, Engel and Bernstein. Based on the above, the Commission finds that an appropriate permanent partial disability award is 7.5% loss of Petitioner's person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner suffered an accident arising out of and in the course of his employment **[*7]** with Respondent on February 10, 2010.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's condition of ill-being was causally related to said accident.

IT IS FURTHR ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 299.99 per week for a period of 25-6/7 weeks, that being the period of temporary total incapacity for work under § 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 270.00 per week for a period of 37.5 weeks, as provided in § 8(d)(2) of the Act, for the reason

that the injuries sustained caused the Petitioner to suffer a 7.5% loss of use of his person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 9,293.23 for medical expenses under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition for Penalties and Fees is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury. **[*8]**

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 34,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefore and deposited with the Office of the Secretary of the Commission.

ATTACHMENT:

ARBITRATION DECISION

NATURE AND EXTENT ONLY

Manuel Rosas
Employee/Petitioner
v.

GM Warehouse, Inc.
Employer/Respondent

Case# **10** WC **22655**

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gilberto Galicia,** Arbitrator of the Commission, in the city of **Chicago,** on **5/12/11**. By stipulation, the parties agree:

On the date of accident, **2/10/10**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

On this date, Petitioner sustained an accident that arose out **[*9]** of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned **$ 23,400.00,** and the average weekly wage was **$ 450.00.**

At the time of injury, Petitioner was **21** years of age, ***single*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have NOT been provided by Respondent.

Respondent shall be given a credit of **$ 0** for TTD, **$ 0** for TPD, **$ 0** for maintenance, and **$ 0** for other benefits, for a total credit of **$ 0.**

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of **$ 299.99**/week for **25 & 6/7** weeks, from **6/4/10** through **12/1/10**, which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of **$ 270**/week for a further period of **[*10] 62.5** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **12.5% loss of a man as a whole.**

. The respondent shall pay the petitioner compensation that has accrued from **2/10/10** through **5/12/11,** and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of **$ 9,293.23** for necessary medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay **$ 0** penalties, as provided in Section 19(k) of the Act.

. The respondent shall pay **$ 0** in penalties, as provided in Section 19(1) of the Act.

. The respondent shall pay **$ 0** in attorneys' fees, as provided in Section 16 of the Act.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before **[*11]** the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

6-17-11

Date

Findings of Fact

10 WC 22655

Petitioner is 6' 1", right handed and weighs approximately two-hundred and twenty-five (225) lbs. On the date of accident, Petitioner had been employed as a laborer by Respondent, a grocery store warehouse, for the previous one and a half years (1 1/2). As part of his warehouse duties for Respondent, Petitioner was in charge of order filling and inventory. His duties included the weekly checking of inventory, the stocking of shelves, and the picking of warehouse product onto pallets so that it could be shipped to the requesting grocery store.

Petitioner's job duties required heavy lifting. On a daily basis, Petitioner lifted ninety (90) lbs boxes of meat up to twenty (20) times per day. When fulfilling deli orders, Petitioner would also lift 87.5 lbs buckets of cheese and place them upon the pallet order he was filling. On a daily basis, Petitioner would lift twenty (20) to forty (40) cheese buckets per day. Once the pallet was filled, Petitioner would also help load the pallets onto semi **[*12]** trailers.

Prior to commencing his employment for Respondent, Petitioner did not have a history of a low back injury, did not have complaints of low back pain or radiculapathy into his lower extremities, and had never undergone diagnostic studies of his spine. Upon commencing his employment for Respondent and through the date of injury, he was able to complete all his job duties without any complaints of pain.

On Wednesday, February 10, 2010, Petitioner reported to work for Respondent at approximately 6:00 am. On said date, Petitioner was stacking a pallet of 87.5 lbs buckets of cheese for a deli order. In order to move the buckets, Petitioner would grab the bucket handle with both his hands and carry the container three (3) feet onto a pallet. At approximately 2:00 pm, he lifted a bucket of cheese and twisted his body left as he turned towards the pallet. He immediately felt a crack in his right lower back and noticed pain that was rated a 6/10. Petitioner continued working and finished his shift. As he continued with his work duties, he noticed increased low back pain. At approximately 3:00 pm, prior to leaving for the day, Petitioner informed his supervisor, Efrain Carrillo, of **[*13]** the work accident.

At approximately 5:00 pm, Petitioner called Mr. Carrillo's personnel cell phone and informed him of increased low back pain. Petitioner was instructed by Mr. Carrillo to go to a pharmacy and obtain pain pills. Subsequently, on February 18, 2010, a Form 45 accident report was filled out by Petitioner and turned into Respondent (PX 11).

Petitioner returned to work the Thursday and Friday following the accident. As he continued working, he noticed increased pain in his low back. On Friday, February 12, 2010, he began experiencing radicular complaints in his right lower extremity. Petitioner informed his supervisor of the increased pain. He was instructed not to return to work until the following Wednesday, February 17, 2010. Due to the ongoing complaints of pain, upon his return to work, Respondent instructed Petitioner to seek medical attention at a company clinic.

On February 17, 2010, Petitioner sought medical attention at Mercy Works and was seen by Steven Anderson, D.O to whom he complained of right low back pain with right lower extremity radiation, pain, numbness and tingling (PX 1). Petitioner provided an accident history that is consistent with his testimony **[*14]** and the Form 45 accident report. Petitioner was prescribed pain medication and sent back to work in a **light duty** capacity (PX1). On March 9, 2010, Petitioner was prescribed physical therapy (P/T) which continued through April 7, 2010. The P/T program was unsuccessful in eradicating his symptoms (PX. 1). On April 15, 2010, Petitioner underwent an MRI that was read by Gunner Anderson, MD, and evidenced a "4 mm right paracentral disc at L5/S1 with associated right paracentral canal stenosis" and a "small disc herniation at L4/5 extending inferiorly with associated central canal narrowing (PX 1)."

Upon referral by Dr. Anderson, on April 29, 2010, Petitioner was evaluated by Theodore Fisher, M.D. at Illinois Bone and Joint Institute, LLC (PX 2). Petitioner provided a consistent accident history and reported complaints of low back pain with intermittent bilateral radicular pain (PX 2). Dr. Fisher diagnosed Petitioner with L4/5 and L5/S1 disc herniations with L4/5 spinal stenosis (PX 2). Petitioner was allowed to remain working at a **light duty** capacity. During a May 26, 2010 follow up appointment, Dr. Fisher recommended epidural steroid injections (PX 2). Petitioner instead chose to continue **[*15]** a conservative route of treatment and did not undergo the injections.

Petitioner testified that as he continued working with restrictions, he did not notice improvement in his symptoms. Instead, he experienced increased pain and discomfort in his low back and right lower extremity, preventing him from sleeping.

Petitioner reported the complaints to his medical providers and was prescribed pills. Petitioner stopped taking the medication because he would wake up and feel as though he was "hung over".

On June 4, 2010, while still under work restrictions per Dr. Fisher, Petitioner was discharged by his employer. Petitioner was informed his discharge was due to his failure in providing an authentic social security number.

On June 4, 2010, Petitioner chose to seek medical attention at the provider of his choice, Marque Medicos. During his initial consult with Dr. Ryan Fuelleman, D.C., Petitioner once again provided a consistent accident history and complaints of low back pain that was an 8/10 with "sensation of pins and needles in his low back and legs [down] to his knees (PX 3). The clinical exam evidenced radiculapathy with positive bilateral straight leg raises at 45 degrees. Petitioner **[*16]** was prescribed P/T and underwent and EMG that did not diagnostically confirm the radiculapathy complaints (PX 2). As of his first date of treatment, Petitioner was instructed to remain off work; he was not allowed to return to **light duty** work until July 23, 2010 (PX 3 & PX 4).

Petitioner was referred to Andrew Engel M.D. on June 24, 2010. Dr. Engel found a causal connection between Petitioner's accident and his condition of ill being, prescribed pain medication and continued physical therapy (PX 4). As of July 8, 2010, Petitioner reported improvement in his symptoms; the pain level had dropped from an 8/10 to 5/10; the intensity and frequency had also been reduced as a result of the P/T program (PX 4). On July 22, 2010, Petitioner reported continued improvement in his low back pain and no radicular pain in lower extremities (PX 4). In order to address the pain, Dr. Engel prescribed a series of transforaminal steroid injections (PX 4). Petitioner once again chose to forego the injections and continue with the P/T program. On said date, he was returned to work with **light duty** restrictions (PX 4).

Petitioner testified he sought employment at several locations within his **light duty** restrictions. **[*17]** Specifically, Petitioner recalled seeking employment with Total Staffing, Paramount Staffing, Staff Right, Fairplay Foods, and Burlington Coat Factory. Unfortunately, despite his efforts, Petitioner never found employment while he was under **light duty** restrictions. Petitioner also continued his P/T program through October 13, 2010.

Previously, on September 16, 2009, Petitioner was examined by Dr. Avi. Bernstein at the request of Respondent. During the exam, Petitioner complained of low back pain with bilateral lower extremity radiation (RX 1). Upon review of the MRI films, Dr. Bernstein noted "disc abnormalities and disc degeneration from L4 to S1 with protrusion (RX 1)." Dr. Bernstein was aware that Petitioner was only twenty one years of age and did not have a history of back injury or pain. In his report, Respondent's examining physician noted a causal connection between Petitioner's condition and the February 10, 2010 work accident (RX 1). Dr. Bernstein did not opine as to the reasonableness and necessity of the previous treatment. He did, however, recommend a work conditioning regiment to be followed by a functional capacity evaluation (RX 1). He also suggested that Petitioner **[*18]** may benefit from a series of epidural steroid injections to address Petitioner's ongoing subjective complaints (RX 1). Finally, in regards to Petitioner's ability to work, Respondent's examining physician found Petitioner capable of **light duty** work with twenty-five (25) lbs lifting restrictions (RX 1).

On October 14, 2010, in line with Dr. Bernstein's recommendations, Petitioner was prescribed a work conditioning program and referred to Elite Physical therapy (PX 4). Petitioner underwent the work conditioning program from October 21, 2010 through December 1, 2010 (PX 5). Upon completion of the program, Petitioner was seen by Dr. Engel a final time on December 2, 2010 and given a full duty discharge (PX 4).

At arbitration, Petitioner testified he noticed great improvement in his symptoms while undergoing treatment at Marque Medicos, Medicos Pain and Surgical Specialist, and Elite

Physical Therapy. He credits the treatment, as prescribed by his medical providers, for his full duty release and ability to work.

At Respondent's request, the medical records from Marque Medicos were submitted to Denise Rubino, MD for a peer to peer utilization review (RX 2). Dr. Rubino's initially non-certified **[*19]** all treatment with Marque Medicos beginning on June 10, 2010 through October 14, 2010 (RX 2). After reconsideration and a conversation with Petitioner's treating physicians, on December 13, 2010, Petitioner's treatment at Marque Medicos from June 10, 2010 through October 10, 2010 was certified by Dr. Denise Rubino (RX 3). Dr. Rubino noted that Petitioner responded "very well" to the treatment provided (RX 3). No reason was provided for the denial of treatment after October 10, 2010.

At arbitration, Respondent presented the testimony of Efrain Carrillo, a five year employee of Respondent's and the warehouse manager. Mr. Carrillo testified that the accident was reported on February 18, 2010. On cross examination, he admitted he was not entirely sure whether or not Petitioner reported the accident to him at the end of the shift or if he received the subsequent phone call later that night. Mr. Carrillo testified that Petitioner was discharged on June 4, 2010 because he could not present a "good" social security number.

Approximately three and a half (3 1/2) weeks after being discharged without restrictions by Dr. Engel, Petitioner found full time employment at a video distribution warehouse. **[*20]** His job duties required that he pack DVD's into twenty (20) lbs boxes. After packing the boxes, Petitioner would then stack the boxes onto a pallet. During an eight hour shift, Petitioner packages and stacks up to three hundred (300) boxes.

Despite the great improvement resulting from the conservative medical treatment, Petitioner continues noticing increased pain in his low back and also tires quickly while at work. Petitioner must take pain medication three to four times per week due to his back pain. When experiencing flare ups in pain, Petitioner takes the four pills that were prescribed to him by Dr. Engel. In addition to the pain medication, Petitioner also undergoes a home exercise and stretching regiment approximately five (5) times per week to help control his pain.

Petitioner's ongoing pain has also negatively impacted petitioner's life outside of work. Prior to his work injury, Petitioner actively played basketball with friends. Post accident, when attempting to play basketball, Petitioner notices that he is not as fast and experiences pain when he makes quick movements such as twisting or jumping. Petitioner also experiences increased low back pain if he sits in a vehicle **[*21]** for more than an hour. On long car rides, he must exit the vehicle periodically to stretch and calm the pain.

Petitioner's work injury also prevents him from getting a full night's rest without waking in the middle of the night. Approximately three to four (3-4) times per week, he wakes up in pain and must stretch and take pain medication to get back to bed.

Finally, Petitioner testified that his work injury has also negatively impacted his night life. Prior to the injury, he frequented dance night clubs where he would dance from four to five hours per night. Since his work accident, when petitioner attempts to dance, he notices increased pain in his low back and must sit down to rest and calm the pain.

CONCLUSIONS OF LAW

With Respect to Accident, the Arbitrator concludes the following:

With respect to accident, the Arbitrator concludes Petitioner satisfied his burden of establishing a work accident occurred on February 10, 2010. In reaching this conclusion, the Arbitrator takes into account, Petitioner's credible testimony, Mr. Carrillo's testimony that an accident was reported to him, the work accident report submitted at PX 11, and Petitioner's consistent accident **[*22]** history provided to each of his medical providers.

In sum, Petitioner has offered clear and convincing evidence proving a work accident occurred. Respondent failed to offer any evidence that contradicts or puts into questions any of the aforementioned evidence. As such, the Arbitrator concludes Petitioner sustained a work accident on February 10, 2010.

With Respect to Notice, the Arbitrator concludes the following:

With respect to notice, the Arbitrator concludes Petitioner reported the accident within the time limits stated by the Act. Petitioner provided notice to Respondent on various occasions, all of which satisfy the requirements of the Act.

The Arbitrator concludes that Respondent was first provided notice on the date of accident when Petitioner reported the work injury at the end of the shift to supervisor, Efrain Carrillo. Respondent was next provided notice when Petitioner called Mr. Carrillo, later that night to complain of increased pain. A third notice was given on February 18, 2010 when Petitioner filled out the accident report (PX 11).

Taking into account the aforementioned overwhelming evidence, the Arbitrator concludes Petitioner did report the accident to Respondent **[*23]** within the timeframe provided by the Act.

With respect to causal connection, the Arbitrator concludes the following:

Taking into account the record as a whole, the timeline of events, Petitioner's young age, and the fact that he did not have a prior history of low back pain or injury, the Arbitrator concludes that Petitioner satisfied his burden in establishing his conditions of ill being, disc herniations with stenosis at L4/5 and L5/S1, are causally related to the work accident of February 10, 2010.

On the date of accident, Petitioner was twenty-one (21) years old and did not have a prior history of low back injuries. When Petitioner arrived at work on the date in question, he was completely asymptomatic and was able to complete his heavy lifting job duties without any complaints of pain. Petitioner's complaints of low back pain and radiculapathy did not commence until after he injured himself lifting an 87.5 lbs bucket of cheese. Post work injury, Petitioner was diagnosed with a disc herniation at two levels, L4/5 and L5/S1, with stenosis and clinically confirmed radiculapathy. All of Petitioner's medical providers (Dr. Anderson, Dr. Fischer, Dr. Fuelleman, and Dr. Engel) **[*24]** agree with diagnosis and acknowledge Petitioner did not have a prior history of injury. On the first date of service at Medicos Pain and Surgical Specialist, Dr. Engel noted that "this work-related accident is the direct cause of [Petitioner's] current pain complaints (PX 3)."

Respondent's section 12 examining physician is also of the opinion that the work accident is causally connected to Petitioner's complaints of low back pain and radiculapathy (RX 1). Dr. Bernstein is of the opinion, that as a twenty-one (21) year old man, Petitioner "aggravated a pre-existing degenerative condition of the lumbar spine making his low back symptomatic."

Whether it is an aggravation of a pre-existing condition or an acute injury, all the evidence presented at arbitration lends itself to show that Petitioner's condition of ill-being is casually related to the work accident on February 10, 2010. Petitioner testified he never had low back pain and never experienced radicular symptoms in his lower extremities until after the work accident. The medical records support Petitioner's testimony.

Respondent failed to offer any evidence even suggesting Petitioner had a prior history of low back pain or that **[*25]** his current condition of ill being was not related to the work accident. Respondent's own exhibit, RX 1, supports a conclusion that the Petitioner's condition is causally related to the injury sustained by Petitioner while lifting a bucket of cheese. As such, the Arbitrator concludes that Petitioner's condition of ill being, disc herniations at L4/5 and L5/S1

with stenosis and radiculapathy, are casually related to the work accident of February 10, 2010.

With respect to reasonableness and necessity of accrued medical, the Arbitrator concludes the following:

The Arbitrator concludes that all the medical services rendered by Petitioner's treating physicians were reasonable and necessary to treat his conditions of ill being. At the time of arbitration, pursuant to the fee schedule, the following medical bills remained outstanding:

Marque Medicos	$ 5,546.85
Specialized Radiology	$ 55.00
Medicos Pain and Surgical Specialist	$ 506.52
Elite Physical Therapy	$ 269.88
Prescription Partners	$ 2,914.98
Total Balance:	$ 9,293.23

Almost all the evidence submitted at arbitration, by either Petitioner or Respondent, supports a finding that the medical treatment rendered **[*26]** by Petitioner's medical providers was reasonable and necessary to treat the condition of ill being caused by the work accident on February 10, 2010. This evidence includes Petitioner's testimony, the treating medical records (PX 1-5), Respondent's Section 12 IME report (RX 1), and the utilization review of Dr. Denise Rubino (RX 3).

First and foremost, Petitioner testified that he credited the medical treatment as prescribed by his treating physicians, Dr. Fuelleman and Dr. Engel, for the improvement in his condition of ill-being. Prior to commencing treatment at Marque Medicos, Petitioner was working; however, he *experienced* intense low back and lower extremity pain on a daily basis which hindered his ability to work and sleep. It was not until after he completed Dr. Engel's treatment plan that Petitioner was able to return to work at a full duty capacity. On December 2, 2010, Dr. Engel noted that all treatment rendered was "necessary to return this patient to full duty pain-free work after his work-related accident on [February 10, 2010] (RX 3)."

Respondent's own evidence lends itself to support the above noted conclusion. First, in the Section 12 Report, Respondent's examining **[*27]** physician fails to address the issue as to whether the treatment received through September 16, 2010 was reasonable and necessary. He does, however, recommend continued treatment in the form of a work conditioning program to be followed by an FCE, or a trial of epidural steroid injections (RX 1). After the Section 12 examination, Petitioner was referred by Dr. Engel to Elite Physical Therapy for work conditioning. The Arbitrator concludes that Dr. Bernstein's failure to address the past treatment is an acknowledgement of the reasonableness and necessity of the prior treatment.

Additionally, Respondent submitted into evidence the December 10, 2010 Utilization Review by Dr. Rubino in which she reconsiders her prior report of November 5, 2010 and certifies all physical therapy at Marque Medicos from June 10, 2010 through October 10, 2010 (RX 2 and RX 3). Dr. Rubino's reconsideration and certification of treatment is based upon the fact that Petitioner "responded very well during this time, pain resolved and he is back to work (RX 3)." Dr. Rubino provides no reason as to why treatment after October 10, 2010 was not certified.

Ultimately, the treatment plan, which included pain medication, **[*28]** physical therapy and a work conditioning program, as administered by Petitioner's medical providers was successful in returning him to full duty work. This plan proved successful and was actually less costly and invasive than the epidural steroid injections recommended by Dr. Fisher, Dr. Engel, and Dr. Bernstein. The conservative treatment rendered provided maximum results with minimal costs and physical risk to Petitioner.

In sum, Petitioner testified at arbitration that the course of treatment as prescribed by his medical providers is responsible for the improvement in his symptoms. Dr. Engel is also of the opinion that the treatment rendered is directly responsible for the Petitioner's improvement (RX 3). In addition, Respondent's own evidence supports a finding that the treatment was reasonable and necessary (*SEE* RX 1 and RX 3). Respondent has failed to offer any evidence that even remotely suggests that the treatment was not reasonable and necessary. As such, Petitioner is awarded the sum of $ 9,293.23 for medical treatment pursuant to the fee schedule of the Act.

With respect to nature and extent, the Arbitrator concludes the following:

The Arbitrator concludes that **[*29]** as a result of the February 10, 2010 work accident, Petitioner sustained disc herniations at L4/5 and L5/S1 with stenosis and lower extremity radiculapathy. Considering the record as a whole and Petitioner's testimony, the Arbitrator concludes Petitioner suffered 12.5% loss of a man as a whole pursuant to Section 8(d)2 of the Act.

After undergoing, conservative treatment which included, prescription medication, physical therapy, and a work conditioning program, Petitioner was ultimately able to return to work at full duty. Nevertheless, despite his significant physical recovery, Petitioner continues to suffer from the ill effects of his work injury.

Prior to his work accident, Petitioner did not have chronic complaints of low back pain or radiculapathy traveling down his right lower extremity. Petitioner was fully capable of completing his work duties without any complaints of pain, engaged in prolonged physical activities such as basketball and dancing, enjoyed extended car rides, and was able to sleep without waking up in the middle of the night due to back pain.

Post work injury, Petitioner is able to complete his work duties; nevertheless, he has ongoing complaints of low back **[*30]** pain, especially after a day of work. Petitioner testified that he is no longer able to complete his shift without experiencing pain. Approximately four (4) times per week, he takes pain medication to calm his pain. Petitioner was prescribed four (4) different pills by Dr. Engel; thus, Petitioner is taking up to sixteen (16) pills per week to cope with his pain. In addition to pain medication, as a twenty two (22) year old man, Petitioner must undergo a home exercise and stretch program up to six times per week to help control his ongoing pain.

Petitioner's social life has also been negatively impacted by this work injury. He can no longer play basketball at the same level he did previously and experiences increased pain if he goes out for a night of dancing. He can no longer dance a whole night; since the accident, he has to take frequent breaks to avoid aggravating his back pain.

Considering the record as a whole, including the fact that the Petitioner continues to suffer from symptoms of his work injury, the Arbitrator finds the Petitioner suffered 8% loss of a man as a whole pursuant to Section 8(d)2 of the Act or 75 week. At a PPD rate of $ 270.00 for 75 weeks, Petitioner is **[*31]** awarded $ 20,250 in permanent partial disability.

With respect to TTD, the Arbitrator concludes the following:

The Arbitrator concludes the Petitioner is entitled to temporary total disability benefits from June 4, 2010 through December 1, 2010; representing a total of twenty-five and six-sevenths (25 & 6/7th) weeks. In doing so, the Arbitrator took into consideration Federal Statute 8 USCS § 1324a(a)(2); the Appellate Court's ruling in Economy Packing Company v. Illinois Workers' Compensation Commission (387 Ill. App. 3d 293); and the Supreme Court's ruling in **Interstate Scaffolding** v. Illinois Workers' Compensation Commission (236 Ill. 2d 132).

On June 4, 2010, Petitioner was discharged while under work restrictions from Dr. Fisher. On

said date, Petitioner sought medical treatment at Marque Medicos and was instructed to remain off work (PX 3). Per the instructions of Dr. Fuelleman and Dr. Engel, Petitioner remained off work through July 22, 2010 (PX 3 and PX 4). From July 23, 2010 through December 1, 2010, Petitioner was able to work with restrictions but was not provide work **[*32]** by Respondent. Petitioner testified he sought employment within his restrictions at various locations; unfortunately however, he was unable to find an employer that would accommodate his work restrictions.

Respondent asked the Arbitrator to take into consideration 8 USCS § 1324 a(a)(2). This statutes states, "It is unlawful for a person or other entity, after hiring an alien for employment, to continue to employee that alien in the United States knowing that the alien is (or has become) an unauthorized alien with respect to such employment."

In Economy Packing, the Appellate held that pursuant to the Workers' Compensation Act, an undocumented worker is entitled to Permanent Total Disability Benefits despite their undocumented status. *See* 387 Ill. App. 3d 283. In reaching its decision, the court concluded "all aliens in the service of another pursuant to a contract for hire, regardless of immigration status, are considered "employees" within the meaning of the Worker's Compensation Act and under Illinois law, are entitled to receive workers' compensation benefits." Id. at 289. The court **[*33]** held that federal immigration law does not expressly or implicitly preempt state laws from allowing aliens, who sustain workplace injuries, to recover workers' compensation benefits. Id. at 290, 292.

In **Interstate Scaffolding**, the Supreme Court examined the issue of whether an employee who was discharged for cause was entitled to TTD benefits. The court held:

> "[A]n employer's obligation to pay TTD benefits to an injured employee does not cease because the employee had been discharged, whether or not the discharge was for "cause." When an injured employee has been discharged by his employer, the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits. 236 Ill. 2d 132 at 149.

The **Interstate Scaffolding** court found the injured worker was not at maximum medical improvement and therefore held that he was entitled to TTD benefits. Id.

In the case at hand, Petitioner was discharged **[*34]** while he was still under work restrictions. From June 4, 2010 through December 1, 2010, Petitioner was either off work completely or able to work with restrictions per Dr. Fuelleman or Dr. Engel. The Section 12 report of Dr. Bernstein supports the conclusion that Petitioner was not at MMI until December 1, 2010. In his report, Dr. Bernstein suggests that Petitioner either undergo a work conditioning program to be followed by an FCE, or he could also consider a trial of epidural injections to help with the pain (RX 1). Respondent's medical expert further opines, "In the mean time, the [Petitioner] should be able to participate in **light duty** work activity with 25 lb. lifting restriction [sic] (RX 1)."

Respondent's medical expert was agreement that Petitioner was not at maximum medical improvement (MMI) until he either completed the work conditioning program or underwent the series of epidural steroid injections. Respondent has not offered any evidence to suggest Petitioner was at MMI prior to December 2, 2010. All the evidence at hand suggests petitioner's condition had not stabilized until he was discharged by Dr. Engel.

it is well settled under Illinois law that injured workers are **[*35]** entitled to benefits under the Workers' Compensation Act regardless of their immigration status. In the case at hand,

Petitioner was allegedly terminated because he was unable to provide a valid social security number. If Petitioner did not have a valid social security number, his continued employment of Petitioner by Respondent would be a violation 8 USCS § 1324 a(a)(2).

Respondent claims to have a valid reason for Petitioner's discharge; nevertheless, in light of ruling in **Interstate Scaffolding**, the reasoning for Petitioner's discharge is immaterial to the issue at hand. The only material question is whether Petitioner was at MMI. It is clear from the medical records (PX 1-5) and Respondent's Section 12 report that Petitioner was not at MMI until December 2, 2010. From June 4, 2010 through the date of discharge, Petitioner was either off work completely or able to work with Restrictions. Respondent was unable or unwilling to provide **light duty** work. As such, pursuant to the Supreme Court's ruling in **Interstate Scaffolding**, Petitioner is entitled to TTD benefits from June 4, 2010 through December 1, 2010 for a total of twenty-five and **[*36]** six-seventh (25 6/7th) weeks. At a TTD rate of $ 299.97, Petitioner is awarded $ 7,756.36 in past due TTD benefits.

With respect to penalties and attorney's fees, the Arbitrator concludes the following:

With respect to Penalties and Attorney's fees, the Arbitrator concludes that the Respondent presented a "good faith" defense and penalties are not warranted.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: **Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions**
Terms: **"interstate scaffolding" and "light duty" or "restricted duty" and date geq (11/01/2011)** (Suggest Terms for My Search)
View: Full
Date/Time: Thursday, November 1, 2012 - 9:07 AM EDT

*12 IWCC 507; 2012 Ill. Wrk. Comp. LEXIS 679, **

LARRY MCCARTHY, PETITIONER, v. NAVISTAR, RESPONDENT.

No. 09WC 03286

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

12 IWCC 507; 2012 Ill. Wrk. Comp. LEXIS 679

June 5, 2012

CORE TERMS: temporary total disability, clerical error, return to work, accommodated, touchstone, claimants, surgery, benefits paid, recalled, retired

JUDGES: Michael P. Latz; David L. Gore; Mario Basurto

OPINION: [*1]

ORDER

On May 29, 2012 Respondent's Attorney filed a Motion for Clerical Error on the above-captioned case.

Upon consideration of said Petition the Commission is of the opinion that the Respondent's Motion for Clerical Error should be granted and the Commission's Decision and Opinion on Review dated May 11, 2012 recalled due to a clerical error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated May 11, 2012 is hereby recalled and a corrected decision issued simultaneously. The parties should return their original decisions to Commissioner Michael P. Latz.

ATTACHMENT:

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all

parties, the Commission, after considering the issues of temporary total disability, medical expenses, and permanency, the Commission modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission notes that Dr. Park released Petitioner to return to work with restrictions on July 13, 2009. (PX12) There is nothing in the **[*2]** record to indicate that Petitioner notified Respondent as to his conditional release back to work. Petitioner subsequently retired on September 10, 2009. (T. 10.21-22) Petitioner testified that he retired because his physical health had "deteriorated to the point" where he "knew" he could not return to work. (T.21)

The Commission notes that in **Interstate Scaffolding,** Inc. v. IWCC, 236 Ill.2d 132, 148 (2010), the Illinois Supreme Court explained that:

> the touchstone for determining whether the claimants were entitled to TTD benefits was not the voluntariness of their departure from the workforce, as the appellate court believed. Rather, the touchstone was whether the claimants' conditions had stabilized to the extent that they were able to reenter the work force.

The record establishes that Petitioner's restrictions of part-time and **light duty** work were accommodated following his first surgery on January 20, 2009. The Commission finds that there is nothing to indicate that Respondent would not have accommodated Petitioner's restrictions following the second surgery on May 1, 2009. And as previously noted, Petitioner did not notify Respondent of his **[*3]** release to return to work with restrictions by Dr. Park on July 13, 2009. Therefore, the Commission finds that Petitioner failed to prove his entitlement to temporary total disability benefits after July 13, 2009.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 14, 2011, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 352.57 per week for a period of 6 weeks, from February 16, 2009 through March 29, 2009, that being the period of temporary partial disability benefits under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 470.10 per week for a period of 24-1/7 weeks, from December 15, 2008 through February 15, 2009, and from March 30, 2009 through July 13, 2009, that being the period of temporary total disability benefits under § 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 423.09 per week for a further period of 96.75 weeks, as provided in § 8(e)12 of the Act, because the injuries sustained caused a 45% loss of use **[*4]** of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 10,339.85 for medical expenses, pursuant to the fee schedule, under § 8(a) and § 8.2 of the Act, and Petitioner shall be held harmless for any amounts pain on account of this injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $ 6,245.58 for temporary total disability benefits paid, and a credit of $ 24,821.53 for medical benefits paid under § 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all

amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 30,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: JUN 5 - 2012

Michael **[*5]** P. Latz

David L. Gore

Mario Basurto

Source: **Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions**
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Date/Time: Thursday, November 1, 2012 - 8:47 AM EDT

*12 IWCC 534; 2012 Ill. Wrk. Comp. LEXIS 609, **

JUAN MEJIA, PETITIONER, v. TRANSPORT PRODUCTION SYSTEMS, RESPONDENT.

NO: 10WC 18921

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF KANE

12 IWCC 534; 2012 Ill. Wrk. Comp. LEXIS 609

May 16, 2012

CORE TERMS: pain, neck, cervical, tenderness, forklift, lumbar, medication, alcohol, doctor, causally, collective bargaining agreement, light duty, thoracic, testing, spasm, notice, return to work, injections, mid-back, strain, spine, wakes, fine, current condition, commencing, substance abuse program, personal injury, motor vehicle, years earlier, fee schedule

JUDGES: Daniel R. Donohoo; Thomas J. Tyrell; Kevin W. Lamborn

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of the nature and extent of Petitioner's disability and medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 15, 2011 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the

sum of $ 37,600.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

ATTACHMENT: **[*2]**

ARBITRATION DECISION

Juan Carlos Mejia
Employee/Petitioner

v.

Transport Production System, Inc.
Employer/Respondent

Case # **10** WC **18921**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **J. Kinnaman**, Arbitrator of the Commission, in the city of **Geneva, IL**, on **7/15/2011**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
J. [X] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [X] What temporary benefits are in dispute?
[X] TTD
L. [X] What is the nature and extent of the injury?

FINDINGS

On **5/5/2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between **[*3]** Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $ **22,307.40**; the average weekly wage was $ **437.40**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **1** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical

services.

Respondent shall be given a credit of $ **0** for TTD, $ **0** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of $ **0**.

Respondent is entitled to a credit of $ 0 under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ **291.60**/week for **7** weeks, commencing **5/10/2010** through **6/27/2010,** as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services **[*4]** of $ **25,625.75,** as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $ **262.44**/week for **37.5** weeks, because the injuries sustained caused the **7.5%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

Aug. 12, 2011

Date

Petitioner testified through an interpreter that on May 5, 2010 he had been working for Respondent for 6-1/2 years as a forklift driver. He was laid off on June 24, 2011. On May 5, 2010, about 1:15 PM, Petitioner was on a stand-up forklift operating in **[*5]** reverse when he was hit in the back by a co-worker who was on a sit-down forklift, also in reverse. His supervisor was present. Petitioner immediately noticed pain in his back at the neck. Accident is not in dispute.

Petitioner testified he had no previous injury to his neck or back. He was involved in a work accident six years earlier that resulted in a 4 inch scar over his right eye. About 10 years earlier he was in a small car accident but he had no injury.

Petitioner testified that on May 5, 2010 he was taken to Tyler Medical Services (TMS). There he was to be given a urine test. He was there for three hours. But he is diabetic and though he tried, he was unable to urinate. They just wanted him to urinate and did not tend to his back. He did not take the urine test that day, but left TMS and went to St. Alexius. RX7 includes the TMS records of May 5, 2010. They show the alcohol testing time was 14:04. Petitioner signed a form, in Spanish, refusing to provide a specimen. By letter dated May 6, 2010, Respondent notified Petitioner his failure to follow procedure resulted in a "Refusal to Test" which is considered a positive result. He was advised he should enroll in a drug and **[*6]** alcohol program immediately.

Petitioner went to St. Alexius Medical Center on May 5, 2010 at 17:32. He described his accident and complained of bilateral neck pain that was constant and described as 8/10. He

also complained of a headache radiating to his neck. On examination, there was generalized cervical and para-cervical tenderness and mid-thoracic tenderness. X-rays were done. The diagnosis was cervical and thoracic sprain. Petitioner was given medication and discharged. He was told to follow up with occupational medicine. PX1.

Petitioner was sent to TMS on May 6, 2010 where he saw Dr. Long. With the assistance of an interpreter, Petitioner demonstrated how the accident occurred. Dr. Long wrote that the forklift did not actually strike Petitioner, "but the impact caused him to hyperextend his back... There was no blunt trauma." He complained of pain in the lower cervical and upper lumbar areas on his right. On exam there was midline and paracervical tenderness from C5-7 with no spasm but complaints of pain with bilateral rotation of the neck. There was palpable tenderness with slight spasm between L1-L3 and Petitioner noted slight pain. There was complaint of discomfort, but **[*7]** not pain, with flexion of the lumbar spine. The straight leg raising test (SLR) was nearly 90 degrees on both sides with no back pain. Deep tendon reflexes of the upper and lower extremities were +2/4 throughout. No loss of sensory perception was appreciated. Dr. Long's diagnosis was cervical strain and lumbar strain and spasm. Petitioner was given medication. He was kept off work on May 7, 2010 and then released to **light duty** with no lifting, pushing or pulling more than 10 lbs.; stooping/bending as tolerated; no forklift operation; no commercial driving; stair climbing only; no above-shoulder reaching or lifting. The TMS records of May 7, 2010 confirm Petitioner is a type 2 diabetic.PX4.

On May 10, 2010, Petitioner was seen by chiropractic doctor Nellie Christ at Grandview Health Partners. The accident is described, indicating Petitioner was sandwiched between the two forklifts. Petitioner complained of cervical, thoracic and lumbar pain with headaches. He said the cervical and lumbar pain was sharp and shooting. Petitioner was taken off work and chiropractic treatment ensued. PX5.

Dr. Christ referred Petitioner to Dr. Pareja, a pain management specialist, who Petitioner saw on **[*8]** May 24, 2010. He found diffuse tenderness to palpation over the trapezius muscle but otherwise good range of motion of the neck. There was tenderness to palpation at C2. The low back was diffusely tender with good range of motion and increased pain with flexion. Dr. Pareja began medication and prescribed MRIs. He opined Petitioner's condition was causally related to the accident. The MRIs were done May 25, 2010. The thoracic and lumbar spine MRIs were normal. The cervical MRI showed straightening and reversal of the usual cervical curvature, probably representing post-traumatic muscular spasm. There was a disc herniation at C6/7 indenting the ventral surface of the thecal sac without significant spinal stenosis. PX6.

Petitioner also went to the Chicago Pain and Orthopedic Institute where Dr. Dasgupta administered trigger point injections on July 30, 2010 and Dr. Patel administered another series on Aug. 9, Aug. 23, and Sept. 15, 2010.PX7. Petitioner testified he had no referral to these doctors.

Petitioner was released to work on June 10, 2010 but told to stretch five or six times a day. On July 30, 2010 he was given epidural steroid injections and released to work on Aug. 2, 2010. **[*9]** On Sept. 14, 2010, Dr. Christ wrote that Petitioner had reached maximum benefit of conservative care and could return to work. PX5.

Thomas Wisla testified for Respondent that he is its operations manager and was in that job on May 5, 2010. Petitioner is one of his employees. Petitioner was a warehouse worker required to lift between 15 and 35 lbs. Respondent's employee handbook and a collective bargaining agreement applied to Petitioner. The handbooks require immediate reporting of work accidents. They also require post-accident substance testing. Under the collective bargaining agreement, the failure to test is allowed one time in a lift time. An employee may be discharged for failing to take or pass a substance test, but can go to an alcohol/substance abuse program and come back one time. **Light duty** is always available based on a doctor's statement. But failing to take a substance test would prohibit a return to work **light duty.** There is a grievance procedure under the collective bargaining agreement. Wisla testified he was familiar with Petitioner's

accident. But Petitioner did not report any pain to him or to his supervisor, Don Grant, when he called from the clinic. Petitioner **[*10]** was taken to TMS on May 5, 2010 for post-accident testing, not because he claimed an injury. After Petitioner completed the alcohol/substance abuse program, he was allowed to return to **light duty.** He never exhibited any pain, never called off work or mentioned pain. But he wasn't doing his regular job. If there was filing, he would do it within the doctor's restrictions. But usually there wasn't anything for Petitioner to do.

He'd be in the office and he was paid. On Sept. 15, 2010, Petitioner returned to full duty work. He provided a full duty release. He never reported any pain and worked regular hours, but no overtime. There was a layoff as of June 24, 2011 after Respondent lost a big account. Eight out of 16 employees lost their jobs. A statement by Don Grant was admitted as RX6, without objection.

RX1 is a print-out of records of the Clerk of the Circuit Court of Cook County showing Petitioner was a defendant in a personal injury (motor vehicle) claim, 1998-L-000314 and in a personal injury (motor vehicle), subrogation, 1996-MI-010911. Both were dismissed for want of prosecution. Petitioner testified he was the defendant in only one claim, that involving Joyce Green.

At trial, **[*11]** Petitioner claimed TTD commencing May 10, 2010 through June 27, 2010. ARBX1. He testified he was not paid benefits during this period. Petitioner initially claimed TPD benefits for the period June 28, 2010 through Sept. 15, 2010 when he was working **light duty.** He withdrew this claim on the record. ARBX1.

Petitioner claimed unpaid medical bills at trial based on the amounts billed. Following the close of proofs, the parties stipulated to the amounts that would be due for these bills pursuant to sec. 8.2 of the Act, the medical fee schedule, if liability were found, as follows: $ 1,880.59, St. Alexius Medical Center (PX1); $ 199.65, Radiological Consultants -of Woodstock(PX3); $ 15,504.75, Grandview Health Partners(PX5); $ 5,131.65, .MedHealth Partners(PX6); $ 834.50, Chicago Pain and Orthopedic Institute(PX7); $ 1,223.74, JMS medical Supplies(PX8); $ 24,774.88 Total. In addition, Petitioner claims $ 384.00 for emergency physician charges at St. Alexius, PX2. The bill is not itemized and does not have CPT codes. Petitioner also claims PX9, a prescription drug bill of $ 850.87. Petitioner claims Respondent is liable for the entire bill; Respondent claims it would only be required to **[*12]** pay 76% of the amount billed, if liability is found. In addition, Petitioner claims the bill is incomplete. ARBX1.

Petitioner testified that prior to May 5, 2010, his neck was fine. He now notices it hurts sometimes in the morning when he wakes up. He is taking medication. Through the day, the pain subsides. He takes one pill two or three times during the week when he has pain. On a 10 point scale, his neck pain is a 5. He also uses a TNS machine in the morning and then when he comes back from work. He has had no neck injury since May 5, 2010. Prior to the accident his mid-back was fine. He now notices he's not the same person. Sometimes he wakes up and still has pain. He uses a special pillow. He has discomfort two to three times a week. The mid-back pain is about a 5 on the scale. He does exercises. He hasn't injured his mid-back since the accident. Petitioner also testified that his low back was fine before the accident, but now he wakes up in bad shape. This is about two to three times a week. The low back pain is about a 5 on a 10 point scale. He hasn't injured his low back since the accident.

The Arbitrator concludes:

> 1. Petitioner's current neck, thoracic and low back **[*13]** conditions are causally connected to his undisputed accident of May 5, 2010. This is based on all the medical records showing Petitioner complained of neck pain at St. Alexius Hospital on May 5, 2010 and of the mid and low back as well the next day at TMS. Dr. Pareja opined Petitioner's current condition was causally connected to the accident and there is no medical opinion to the contrary. Although admitted without

objection, RX1 provides no material information about any issue in this claim.
2. Petitioner was temporarily, totally disabled commencing May 10, 2010 through June 27, 2010, a period of seven weeks. This is based on the off work authorizations of the various treating medical providers. Respondent argues Petitioner is not entitled to TTD because he refused to provide a urine sample for drug and alcohol testing on May 5, 2010 as required by the collective bargaining agreement and the employment handbook. A similar argument was rejected in **Interstate Scaffolding,** Inc. v. Illinois Workers' Comp. Comm'n., 2010 Ill. LEXIS 12, 236 Ill.2d 132 (2010) where the Ill. Supreme Court held the only relevant inquiry is whether the injured worker's **[*14]** medical condition had stabilized.
3. Petitioner is entitled to medical expenses of $ 25,625.75 pursuant to sec. 8(a) and 8.2 of the Act. This amount includes the prescription bill of $ 850.87. Prescription expenses are not covered by the medical fee schedule. The award does not include reimbursement for PX2, the charge of $ 384.00. The bill is not itemized. It may represent a balance bill for which neither party is liable. Petitioner did not exceed the two doctor limit of sec. 8(a). He had emergency treatment at St. Alexius. His first choice of provider was Dr. Christ; his second choice was Dr. Pareja.
4. Petitioner is disabled to the extent of 7.5% of the whole person. He sustained strains of his entire spine. In his neck, he sustained a herniated disc at C6/7, by MRI. He had conservative treatment, including injections to the neck. He was released to return to work without restrictions and now reports pain a few times a week that requires medication but subsides through the day.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

Workers' Compensation & SSDI > Compensability > Injuries > General Overview

Source: **Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions**
Terms: **"interstate scaffolding" and "light duty"** (Suggest Terms for My Search)
View: Full
Date/Time: Wednesday, October 31, 2012 - 1:48 PM EDT

In

*12 IWCC 601; 2012 Ill. Wrk. Comp. LEXIS 660, **

MARK A. CESARIO, PETITIONER, v. VILLAGE OF OAK LAWN FIRE DEPARTMENT, RESPONDENT,

NO: 10WC 44968

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

12 IWCC 601; 2012 Ill. Wrk. Comp. LEXIS 660

June 6, 2012

CORE TERMS: light duty, forego, collective bargaining agreement, firefighter, temporary total disability, temporary, confirmed, vacation, elect, sick, hardening, elected, entitlement, light-duty, permanent, vacation time, whereupon, shoulder, Workers' Compensation Act, totally disabled, claimant, workers' compensation, written request, date of trial, permanent disability, work force, case law, disciplinary, case-law, notice

JUDGES: Mario Basurto; David L. Gore; Michael P. Latz

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection, **light duty** and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 15, 2011 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for

further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written **[*2]** request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

ATTACHMENT:

ARBITRATION DECISION

19(b)

Mark A. Cesario
Employee/Petitioner

v.

Village of Oak Lawn Fire Department
Employer/Respondent

Case # **10** WC **44968**

Consolidated cases: **10 WC 44967**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Devriendt**, Arbitrator of the Commission, in the city of **Chicago**, on **June 27, 2011**. After reviewing all of the evidence presented, the Arbitrator **[*3]** hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
L. [X] What temporary benefits are in dispute?
[X] TPD
[X] TTD
O. [X] Other **Light duty offered in alleged violation of written contract.**

FINDINGS

On the date of accident, **10-14-2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $ **73,499.92**; the average weekly wage was $ **1,413.46**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **4** dependent children.

Respondent ***has stipulated it will pay*** all reasonable and necessary charges for all reasonable and necessary medical services ***identified in Petitioner Exhibit 1***.

Respondent shall be given **[*4]** a credit of $ **48,999.60** for TTD, $ **5,652.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **54,651.60**.

Respondent is entitled to a credit of $ under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary partial disability benefits of $ 942.31 per week for 5 &1/7th weeks commencing 11-02-2010 through 12-31-2010.By stipulation the parties agreed that 87 hours of vacation time was taken from the Petitioner during this period that he received his regular salary. The employer will be given credit for the payment of 5&5/7's weeks of compensation but not for the period that it utilized Petitioner's vacation pay.

The Arbitrator finds Petitioner is not entitled to TTD benefits from January 1, 2011 to July 27, 2011 (date of trial) based on the availability and offer of **light duty** work and Petitioner's refusal to accept the assignment. Respondent was on full pay receiving PEDA benefits from 11-01-2009 through 11-01-2010 and no TTD is owed for that period.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary **[*5]** or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

8-15-11

Date

STATEMENT OF FACTS

The underlying facts of this case are largely undisputed. Petitioner testified and Respondent has acknowledged that Petitioner worked as a firefighter/EMT for the Village of Oak Lawn since the year 2000. Petitioner described his first injury on March 30, 2009 whereupon he injured his left shoulder while closing a latched door. Petitioner treated conservatively and returned to work on June 23, 2009.

Petitioner suffered a second injury to the left shoulder on October 14, 2009 while carrying a patient through **[*6]** a doorway. Petitioner fell injuring his left shoulder and also experiencing

refuse to work in a **light duty** capacity can be denied workers' compensation benefits.

CONCLUSIONS OF LAW

In regard to issue (L) TTD and (O) light duty, the Arbitrator finds as follows:

This case was presented before the Arbitrator to determine Petitioner's entitled to TTD benefits after a **light-duty** release to work was issued by the treating physician. It is an undisputed fact that Petitioner was offered a **light duty** assignment and worked from November 2, 2010 to December 23, 2011 (while also taking partial time off for work hardening). At the end of work hardening, Petitioner **[*10]** was given the choice to either continue **light duty** or elect sick-time/vacation time if he wanted to forego a **light duty** assignment. Petitioner declined further **light duty** and elected to take sick pay/vacation time. Petitioner based his right to decline **light duty** on his collective bargaining agreement which outlines any **light duty** assignment as elective and not mandatory. There is no dispute between the parties whether Petitioner has the right to decline **light duty** under the CBA. However, there is a dispute as to whether TTD must be paid by the Village when a firefighter elects to forego a **light duty** assignment.

The CBA is silent on the issue of TTD benefits. Nevertheless, Petitioner is relying upon his collective bargaining agreement to argue that he is entitled to TTD benefits based on his "option" to work a **light duty** assignment. Petitioner specifically testified that he chose to elect vacation and sick time rather than report for **light duty** work. The union representative, Mr. Lanz, acknowledged that nothing in the collective bargaining agreement speaks to entitlement of temporary total disability benefits under the Workers' Compensation Act in the event Petitioner chooses to **[*11]** forego the **light duty** assignment.

Similarly, Fire Chief Sheets testified that the Village abided by the collective bargaining agreement in this case. It was acknowledged that Petitioner has the choice to forego **light duty.** No disciplinary or otherwise adverse employment action was taken against Petitioner for his refusal to work **light duty.** The Village simply followed their own Human Resources policy to deny TTD where **light duty** was refused (R. Ex. # 5). In this regard, the Arbitrator does not find the CBA and the Human Resources policy to be inherently inconsistent. Even assuming arguendo that the Union refused to permit the renewal of Petitioner's **light duty** availability after the initial 45-day period, this collective bargaining agreement does not otherwise compel the Village of Oak Lawn to pay temporary total disability benefits.

Although the Collective Bargaining Agreement and the Human Resources Manual provide some measure of insight on this issue, entitlement to temporary total disability benefits is ultimately dictated pursuant the Workers' Compensation Act and Illinois case-law. Turning to the Workers' Compensation Act which governs the issue in dispute in this case, Section **[*12]** 8(b) of said Act clearly indicates that temporary total disability benefits shall be paid where there is a total incapacity for work as a result of the work accident. Based on the undisputed facts of this case. Petitioner is clearly not totally disabled, as he was provided permanent **light duty** restrictions pursuant to his treating doctor, Dr. Bush-Joseph. In fact, between November 2, 2010 to December 23, 2010, the Petitioner worked a part-time schedule while undergoing work hardening, so he is clearly capable of working a valid **light-duty** assignment. For elected vacation periods, Petitioner is not entitled to TTD benefits.

Moving forward to the period from January 4, 2011 to the date of trial, the Arbitrator turns to long-standing and well settled case law to conclude that Petitioner is not entitled to temporary total disability benefits. It is undisputed by the parties that a **light duty** offer of work was made and Petitioner specifically testified that he chose to forego a **light duty** assignment and elect vacation and sick pay. Petitioner did not testify that he could not work **light duty** based on any medical restriction. He similarly did not cite the CBA as his reason to refuse work. **[*13]** He simply chose to forego the assignment when given the option on January 4, 2011. This is consistent with the testimony of Chief Sheets who verified that at all times, an offer of **light duty** work was made and would continue to be available in this case through the date of

neck pain. Conservative measures failed to resolve Petitioner's complaints and ultimately, Petitioner underwent surgical intervention with Dr. Bush-Joseph on May 24, 2010. Petitioner underwent a normal course of physical therapy as well as work hardening through November 29, 2010 and completed a Functional Capacity Examination as well. Petitioner was placed on permanent restrictions by Dr. Bush-Joseph consistent with the FCE of no lifting over the shoulder level above 15 pounds.

With regard to TTD benefits and Petitioner's **light duty** assignments, Petitioner confirmed he was paid his full salary for the first year while off of work through November 1, 2010. Thereafter, Petitioner worked a blended schedule with approximately 20 hours of work while working around his work hardening schedule. Respondent's Exhibit No. 4 indicates Petitioner worked a total of 151 hours from November 2 through December 23, 2010 and Petitioner testified that he elected vacation time to fill in the remaining hours missed from work during this period.

Petitioner testified to a meeting with Chief George Sheets and Deputy Chief Robert **[*7]** Tutko on or about January 4, 2011 whereupon Petitioner was given the option to either return to **light duty** or continue with **light duty** work or to elect the remainder of his vacation and sick time while off work. Petitioner testified that he chose to forego continued **light duty** and elected to take vacation and sick time rather than return to work. Petitioner also confirmed he filed a grievance through his Union with regard to the **light duty** assignment.

On cross examination, Petitioner confirmed that an offer of **light duty** was made and that he chose to forego returning to work. Petitioner was advised that no TTD benefits would be paid for workers' compensation if he elected to forego a **light duty** assignment.

Testimony of Robert Lanz

Petitioner presented a witness in Robert Lanz, a Village of Oak Lawn firefighter and representative of the Union. It was Mr. Lanz' testimony pursuant to the collective bargaining agreement a firefighter on **light duty** has a 45-day limit whereupon any extension for **light duty** assignment must be approved by the Union as well as agreed upon by the employee and the Village. Mr. Lanz explained that this was to protect permanent positions from being **[*8]** filled by **light duty** employees. Mr. Lanz also explained that it was his belief that some of the administrative tasks performed by Petitioner on **light duty** were potential substituting for what would otherwise be permanent positions at the Village. Mr. Lanz testified that were upwards of 20 plus positions currently unfilled at the Village of Oak Lawn Fire Department. This was the nature of his concern with regard to a **light duty** assignment.

On cross examination, Mr. Lanz admitted that his Notice of Violation (Petitioner's Exhibit 16) indicates that, "There shall be no **light duty** or temporary administrative duty positions or assignments for employees sustaining duty related injuries". However, Mr. Lanz admitted that this statement in his letter was untrue to the extent that there are firefighters currently working **light duty** as Mr. Cesario had done in this case already. Specifically, a firefighter by the name of William McCoy was confirmed to be on **light duty** at the time of trial. It was also acknowledged that Mr. McCoy worked on **light duty** in excess of his 45 day **light duty** preliminary period.

Testimony of Fire Chief George Sheets

Fire Chief George Sheets testified on behalf **[*9]** of Respondent in this matter. Chief Sheets testified to his experience at various fire departments in St. Louis and Michigan as well as his two-year tenor as the fire chief of the Village of Oak Lawn. Chief Sheets confirmed the conversation had with Petitioner on January 4, 2011 whereupon Petitioner was given the option to return to **light duty** or to elect vacation and sick pay. It was confirmed that no TTD would be offered. Chief Sheets explained that this policy was consistent with his understanding of the Human Resources Manual (Respondent's Exhibit No. 5) which delineates that employees who

trial.

To show entitlement to TTD benefits, a claimant must prove not only that he did not work, but that he was unable to work. *City of Granite City v. Industrial Comm'n*, 279 Ill.App.3d 1087; 666 N.E.2d 827 (1996) citing *Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 887, 147 Ill.Dec. 353, 358, 559 N.E.2d 526, 531 (1990). The denial of TTD after a claimant refused to continue working the **light-duty** job has been consistently upheld by our Appellate and Supreme Court. As recently explained by our Supreme Court in ***Interstate Scaffolding***:

> "The fundamental purpose of the Act is to provide injured workers with financial protection until they can return to the work force. *Flynn v. Industrial Comm'n*, 211 Ill.2d 546, 553, 286 Ill.Dec. 62, 813 N.E.2d 119 (2004). **[*14]** Therefore, when determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force. . . . Benefits may also be suspended or terminated if the employee refuses work falling within the physical restrictions prescribed by his doctor. See 820 ILCS 305/8(d) (West 2004); ***Interstate Scaffolding*** *v. IWCC*, 923 N.E.2d 266; 236 Ill.2d 131 (2010) citing *Hartlein v. Illinois Power Co.*, 151 Ill.2d 142, 166, 176 Ill.Dec. 22, 601 N.E.2d 720 (1992); *Hayden v. Industrial Comm'n*, 214 Ill.App.3d 749, 158 Ill.Dec. 305, 574 N.E.2d 99 (1991)."

Such case law is clear that the period of TTD ends when a claimant was offered a **light-duty** job within his restrictions. Just as in these cases referenced, there was no restriction on **light duty** work and no dispute it was available for Mr. Cesario. Therefore, there is **[*15]** no further entitlement to TTD after December 31, 2010.

Petitioner argued, through the testimony of Mr. Lanz, that the Union refused to authorize further **light duty** due to concerns that full-time positions were being staffed by **light duty** workers. However, Mr. Lanz' testimony was inconsistent in this regard. For example, Mr. Lanz cited his written union grievance over Petitioner's assignment, where he asserted that "no **light duty**" shall be worked by firefighters. However, he admitted at trial that several firefighters do in fact work **light duty** currently and that the Union has permitted such assignments well beyond the 45 day period. Furthermore, Mr. Lanz went so far as to say he would not block or otherwise prohibit Petitioner from a **light duty** assignment. Therefore, there seems to be no reason Petitioner cannot simply present for work that continues to be available.

Although Petitioner relies heavily on the collective bargaining agreement which delineates that the Union and firefighter must agree to **light duty** work before any such assignment is provided, Respondent correctly points out that they are abiding by the collective bargaining agreement and are not forcing Petitioner to **[*16]** work nor have they taken any disciplinary or adversarial action against Petitioner for refusing to accept such an assignment. Respondent is simply exercising their right under workers' compensation law (which governs this issue) and refusing to pay temporary total disability benefits to an employee who is not temporary totally disabled. Petitioner is capable of work under his physician's work restrictions, he was offered work and specifically chose to forego such work. Under such instances, Illinois case-law is clear and a Petitioner under such facts is not entitled to TTD benefits.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods

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